91-483 (2)

Supreme Court, U.S.
FILED
AUG 27 1991
OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FLETCHER J. CAMPBELL,

Petitioner,

vs.

MICHAEL ALLEN SCHWARTZ, Grievance Administrator, State of Michigan Attorney Grievance Commission,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

FLETCHER J. CAMPBELL

3714 W. McNichols Road
Detroit, Michigan 48221
(313) 345-8833

Petitioner In Pro Se

TABLE OF CONTENTS

Page(s)

OPINIONS:

Attorney Discipline Board 4-13

Wayne County Hearing Panel #11 14-25

Report of Master 26-74

ORDERS:

Order of Michigan Supreme Court Denying Reconsideration [5-31-91]. 75

Order of Michigan Supreme Court Denying Leave To Appeal [3-22-91]. 76

Supplement Order of Attorney Discipline Board Denying Reconsideration [2-28-91] 77-78

Order of Attorney Discipline Board Reducing Discipline [10-25-90] ... 79-80

Order of Revocation of Panel #11 [3-01-90] 81-85

STATUTE(S), REGULATIONS & COURT RULES:

Statute(s)

MCLA 600.2146 86-87

Michigan Court Rules ["MCR"]

MCR 2.203(B) 88

Michigan Court Rules ["MCR"] [con'd]	Page(s)
MCR 2.312	88
MCR 2.504(B)(2)	89
MCR 2.505(A)	90
MCR 7.210(I)-(J)	90-91
MCR 7.215(F)	91
MCR 8.121(A)(B)(F)	92-93
MCR 8.303	93-94
MCR 9.110(D)	94-96
MCR 9.111	96-97
MCR 9.114	97
MCR 9.115	97-99
MCR 9.126	99-101

Michigan Rules of Professional Conduct ["MRPC"]

MRPC 3.3(a)(1-4)	102
MRPC 3.4(a)-(b)	101
MRPC 3.8(d)	102-103
MRPC 8.4(a)-(c)	103

Michigan Rules of Evidence:

MRE 103(d)	104,137
MRE 803(6)	104-105

Transaction Receipt [NBD]: **Page(s)**

Exhibit "A" 161

Exhibit "56" 106-114

Additional Specific Material Underlying Federal Questions Raised In State Court [See, Sup.Ct.R. 14.1(h) and (k)]:

Sup.Ct.R. 14.1(h) Voluminous Presentments 115-160

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,
Petitioner/Appellee,

v

Fletcher J Campbell, P 11544,
Respondent/Appellant.

ADB 25-88; 133-88

BOARD OPINION

The respondent has filed a petition in accordance with MCR 9.118 seeking review of a hearing panel Order of Revocation. The hearing panel entered its order following its adoption of the findings and conclusions of a master who received the testimony and evidence submitted by the parties and reported his findings to the panel. The panel ruled that the evidence established that the respondent, in connection with his representation of the conservator of an estate, collected a $600 retainer fee without approval of the Probate Court or the affected parties; charged and collected an excessive contingency fee in a probate case; violated an order of the Michi-

gan Court of Appeals directing him to reimburse the estate for excessive fees; and violated an order of the Wayne County Probate Court enjoining him from transferring or spending funds received from the estate.

In a separate case consolidated for hearing, the panel found that the evidence established that the respondent was retained to prosecute an insurance claim for damages sustained in a fire loss. During the course of that representation, the respondent was found to have failed to deposit client funds in an identifiable bank account; to have misappropriated those funds; and to have knowingly provided false information to an Attorney Grievance Commission investigator.

Based upon its review of the whole record and the arguments of the parties, the Attorney Discipline Board has concluded that the proceedings before the hearing panel and master should not be set aside on the basis of the

irregularities or defects claimed by the respondent. The Board further finds that the findings and conclusions of the panel have ample support in the record and should be affirmed. With regard to the discipline imposed, the Board concludes that reduction to a suspension of three years is warranted.

A six-count formal complaint in case ADB 25-88 was filed by the Grievance Administrator February 17, 1988. A second complaint, ADB 133-88, containing three counts, was filed May 25, 1988. The respondent timely answered both complaints. The matters were consolidated administratively by the Board and assigned to Wayne County Hearing Panel #11.

The various procedural defects alleged by the respondent have each been considered by the Board. The Board is not persuaded that any phase of these proceedings has been compromised by a prejudicial irregularity or an error, resulting in a miscarriage of justice.

See MCR 9.107(A). The Board's considerations of these issues has been conducted in light of MCR 9.102(A) which directs that these rules are to be liberally construed for the protection of the public, the courts and the legal profession.

The Board specifically rejects the respondent's claim that the provision of MCR 9.111(B) that a public hearing on a complaint be held within fifty-six days after the date the complaint is filed is jurisdictional and must be strictly construed to require dismissal if the hearing is not commenced within that period. The Board has previously ruled that automatic dismissal of a complaint under a strict reading of that rule would not be consistent with the goals of these proceedings. Matter of Ronald R. Kubik, DP 186/84, [Brd. Opn. February 2, 1987) citing State Bar Grievance Administrator v Posler, 393 Mich 38 (1974); State Bar Grievance Administrator v

Donigan, 403 Mich 172 (1978).

In this case, the panel acted within its discretion by adjourning the hearing scheduled for April 7, 1988 to April 29, 1988. Review of the record discloses that the hearing was further delayed by the replacement of two hearing panel members following the respondent's April 6, 1988 motion to disqualify panel members Zemmol and Jordan. The Board is unable to conclude that these proceedings have been unduly protracted in light of the volume and complexity of the issues raised by the parties during the course of the proceedings.

The respondent also challenges to the Board's appointment of a master to conduct the evidentiary hearings. The respondent's claim that MCR 9.110(D)(3) must be given the strictest and most literal interpretation was considered by the Board and rejected in its order of February 17, 1989. It has not been shown that that order was entered erroneously. The

Board remains unpersuaded that the decision to appoint a panel or a master can be made only at the time the complaint is filed. Under that rule, assignment of a complaint to a master may made "if it appears that the hearing will be a prolonged one". In actually, it is highly unlikely that the staff members of the Attorney Discipline Board would be able to predict which complaints are likely to result in prolonged proceedings. In this case, the request for the appointment of a master came from the hearing panel after two days of hearings on preliminary matters and consideration of a record which, at that point, included 230 pages of pleadings and a transcript of 200 pages. The appointment of a master is affirmed.

The testimony presented before master Steven Kaplan comprises a transcript of an additional 1100 pages. The Board's review of the record below is guided by the appellate

PUBLISHER'S

ORIGINAL PA

standard enunciated by the Supreme Court. The Board's decision is based upon the conclusion that there is proper evidentiary in the whole record for those findings. Grievance Administrator v Crane, 400 Mich 484 (1977); In re DelRio, 407 Mich 336 (1977). The Board has traditionally deferred to a hearing panel's assessment of credibility, Schwartz v Sauer, DP 25.84 (Brd. Opn. P. 359, 1985). In this case, the detailed report of the master includes appropriate references to the evidentiary support for his conclusions and it has not been shown to be erroneous.

Finally, we review the level of discipline imposed in this case. The misconduct which as been established, including misappropriation of client funds and the subsequent misrepresentation that client funds were held in case, falls within that category of misconduct which the Board has found "ranks among the most serious breaches of professional

NOTE:

INATION IS NOT CONTINUOUS.

ethics and seriously undermines public confidence in the legal profession. We have stated that, depending upon several factors, discipline ranging from a suspension from threes years to disbarment would be appropriate for such an offense." Matter of John Hasty, ADB 1-87, Brd. Opn. February 8, 1988; Matter of Douglas E. H. Williams, DP 126/81 (Brd. Opn. p.313, 1984).

The respondent does not enjoy an unblemished disciplinary record, having been reprimanded in 9178. We agree, however, with the conclusion of the panel that the 1978 reprimand is sufficiently remote in time that it has virtually no aggravating effect. In considering the level of discipline, we include as a factor the respondent's otherwise unmarred practice of law in Michigan for twenty-one years.

We have also reviewed the respondent's testimony at the discipline hearing conducted

before the panel together with the pleadings and arguments presented on his behalf in these review proceedings.

Based upon the unique factors presented in this case, we conclude that a suspension of three years is sufficient to achieve the stated goals of these disciplinary proceedings and falls within the range of discipline imposed for similar misconduct in prior cases.

All concur

Member Hanley M. Gurwin did not participate

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ATTORNEY DISCIPLINE BOARD

Report of Wayne County Hearing Panel #11

At a session of said hearing panel held at One Kennedy Square, Suite 1910, Detroit, MI on January 18, 1990.

PRESENT: David J. Rosin, Chairman
Arthur J. Tarnow, Member
Dawn A. VanHoek, Member

Appearances: Cynthia C. Charles, Esq. AGC
Thomas L. E. Stanley, Esq.
for respondent

Pleadings

(See List of Pleadings Marked As Attachment 1)

Exhibits

The indexes to exhibits are set forth in Volumes I through VIII of the transcript of these proceedings.

Panel Proceedings

This matter was commenced with the filing of Formal Complaint ADB 25-88 on February 18, 1988. A second case, ADB 133-88 was filed May 25, 1988 and was consolidated for hearing. The first case was originally assigned to Wayne County Hearing Panel #21. Although the respondent's motion to disqualify members of that hearing panel was denied, the voluntary withdrawal of two members of the panel resulted in the Board's Order of reassignment dated May 12, 1988 assigning this matter to Wayne County Hearing Panel #11. A subsequent Notice of Substitution issued by the Board July 6, 1988 resulted in the establishment of the hearing panel which ultimately heard and decided this case consisting of David I. Rosin, Chairman; Arthur J. Tarnow, and Dawn A. Van Hoek.

The panel conducted preliminary hearings in this matter on July 13, 1988 and September 7, 1988 to dispose of the various motions filed by the parties. During the course of those

hearings, it became evident to the members of the panel that scheduling delays in this case could be avoided if the evidentiary hearings on the factual issues presented were conducted by a single factfinder and a written request was made to the Attorney Discipline Board for appointment of a master. The Board's order appointing Steven M. Kaplan to serve as a master was issued December 23, 1988.

The report of the master Steven Kaplan was filed with the Board November 10, 1989 along with Volumes III through VII of the transcript (Pages 201-1368).

The final hearing conducted by the panel was held on January 18, 1990 and was conducted in the nature of a separate hearing on discipline in accordance with MCR 9.115.(J)(2).

Report on Discipline

Hearings conducted by a master are governed by MCR 9.117. In accordance with that rule, the hearing panel has considered the report of master Steven M. Kaplan filed

November 10, 1989. The panel notes that no objections to the master's report were filed by the respondent or the Grievance Administrator within fourteen (14) days as provided in that rule.

The panel has unanimously determined that the record in this case supports the findings of fact and conclusions of law contained in the master's report. The master's report is specifically adopted and made a part of this report. In summary, the panel adopts the panel's findings that the Grievance Administrator filed to establish professional misconduct as alleged in Case ADB 25-88, Count I; the allegation in Count II that the right of Ophelia Mason to retain substitute counsel was impeded by a contingency fee agreement; Count V; Count VI. The remainder of the allegations in Case ADB 25-88, Counts II, III, and IV were established.

With regard to CASE ADB 133-88, the panel adopts the master's findings that the charges

in Count I, paragraph K, and Count were not established. The other allegations of Count I were established.

As set forth in the master's report, the panel adopts the following conclusions of law:

Conclusions of Law -- Case ADB 25-88

Respondent committed professional misconduct in the following ways:

1. By collecting a $600.00 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A) and (B), and MCR 9.104 (1-4).

2. By charging and, without having the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).

3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104(1-4).

4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4).

Conclusions of Law -- Case ADB 133-88

Respondent committed professional misconduct in the following ways:

1. By failing or neglecting to deposit the funds in an identifiable bank account, funds received on behalf of a client, Shirley Wright, through the collection of a judgment, in violation of DR 9-102(A), DR 1-102 (A)(4-5), and MCR

9.102(1-4).

2. By misappropriating the funds of a client, Shirley Wright, in violation of DR 9-102(A), DR 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a volunteer investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against respondent, in violation of DR 1-102(A) (4-5) and MCR 9.103(3,4,6).

Report on Discipline

At the separate hearing on discipline conducted January 18, 1990 the parties were provided an opportunity to present evidence in the nature of aggravation or mitigation which might have a bearing upon the appropriate level of discipline to be imposed.

Counsel for the Grievance Administrator presented two exhibits which were received. Exhibit #85 is copy of an amended order dated August 29, 1989 by Martin T. Maher, Wayne

County Probate Court Judge, directing that the respondent immediately turn over the Estate of Bessie Irwin the amount of $65,179.17 together with interest at the statutory rate. Exhibit #86 is a copy of an order of reprimand issued against the respondent by the State Bar Grievance Board on September 28, 1978.

The respondent was called to stand to testify in his own behalf. The respondent was admitted to the practice of law in Michigan in June 1969. He testified that the contingent fee agreement in the Matter of the Estate of Bessie Irwin was drafted and executed under his belief that such an agreement was neither illegal or unethical. (Tr.p.1396) With regard to the master's findings as to Count III, ADB 25-88, that he disregarded an order of the Michigan Court of Appeals to return excessive fees to the estate, the respondent points out that the master's report refers to the "indirect" order of that Court to return the fees and respondent argues that he has not will-

fully disobeyed the explicit language of that order. (Tr.p.1406) The panel considered the respondent's testimony on these and other points relating to his actions with regard to these matters.

It is the opinion of the panel that the respondent's 1978 reprimand is sufficiently remote in time that it was virtually no aggravating effect. In considering respondent's testimony as mitigation, the panel notes that the Attorney Discipline Board has defined mitigation as circumstances "such as do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of [respondent's] moral culpability." Matter of Ross John Fazio, DP 105/80, Opn.of Brd. p.146 (1981), citing Louisiana State Bar Association v Sheehan, 338 SO2d, 1347, 1351 (Louisiana 1976).

It is the opinion of the panel that the testimony offered by the respondent does not

tend to mitigate his established misconduct. On the contrary, such testimony tends to support the conclusion that Mr. Campbells is unable to grasp the seriousness of his misconduct or to fully appreciate the nature of his obligations as an officer of the court. The document prepared by the respondent entitled "Power of Attorney and Assignment" (Exhibit #8) giving him a lien on the assets of the estate for a fee equal to one-third (1/3) of the amounts received and giving him a "vested interest" in those amounts was, in our opinion, unconscionable. His continued failure to return the excessive fees to that estate although ordered to do so, constitutes further evidence of the respondent's failure to fulfill his obligations to his former client or to the courts.

The findings and conclusions with regard to ADB 133-88, including findings that the respondent commingled client funds with his own, misappropriated funds of a client and knowing-

ly provided false information during the course of the Grievance Administrator's investigation, constitute acts of misconduct which are sufficiently egregious to warrant substantial discipline. More importantly, those separate acts of misconduct suggests a pattern of misconduct.

Inasmuch as the primary purpose of these proceedings is the protection of the public, the courts and the legal profession, the facts and circumstances in this case lead inescapably to the conclusion that the respondent's license to practice law in Michigan should be revoked.

Prior Discipline

34509-A	Reprimand	9/28/78

Statement of Costs

Attorney Grievance Commission

Mileage	$ 35.02
Telephone	4.05
Postage	6.08
Subpoenas	139.00
Copying (Bank records, Transcripts)	625.83

Travel-air fare (witness)	432.00
total	$1241.98

Attorney Discipline Board

Transcript 7/13/88	$ 485.60
Transcript 9/7/88	232.50
Transcript 5/8/89	842.50
Transcript 6/5/89	881.00
Transcript 6/19/89	694.00
Transcript 7/1/89	751.75
Transcript 7/24/89	600.50
Transcript 1/18/90	250.00
Total	$ 4737.85

Total Amount Due: $5979.83

ATTORNEY DISCIPLINE BOARD
Wayne County Hearing Panel #11

By_____
David I. Rosin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

REPORT OF THE MASTER

I. Introduction

On February 17, 1988 and May 25, 1988, the Attorney Grievance Commission filed formal complaints against Respondent, Fletcher J. Campbell. The cases were consolidated for hearing before Wayne County Hearing Panel #11. The hearing panel appointed a Master on December 23, 1988. A hearing, spread over five days, was concluded on July 24, 1989.

II. Master's Duties

Under MCR 9.117, the Master is obligated to conduct a hearing, analogous to a non-jury trial. After the hearing, the Master is re-

quired to prepare and file a report with the Attorney Discipline Board, containing a brief statement of the proceedings, findings of fact and conclusions of law.

III. Summary of Petitioner's Complaints

A. Case No. 25-88

The crux of this six-count complaint is that Respondent, as the attorney for the conservator and guardian of Bessie Irwin, charged and collected an excessive fee, made false material statements to the Wayne County Probate Court, and failed to comply with Orders of the Michigan Court of Appeals and the Wayne County Circuit Court in connection with his representation of the conservator and guardian.

B. Case No. 133-88

In this three-count complaint, Petitioner alleged that Respondent, retained by Shirley Wright to represent her in an insurance claim, committed the following acts of misconduct:

1. Misappropriated funds derived from a judgment obtained in favor of Shirley Wright in a jury trial concluded on June 11, 1981;

2. Disobeyed an Order entered in the Wayne County Circuit Court prohibiting him from disposing of proceeds he obtained by way of a writ of garnishment against the insurance company's bank; and

3. Made false, material statements to a volunteer attorney of the Attorney Grievance Commission, who was investigating a complaint filed by Shirley Wright against respondent.

IV. Summary of the Testimony

The complainant in Case Number 25-88, Ophelia Mason, testified that she was a friend and neighbor of Bessie Irwin on Trinity Street in Detroit (Tr.pp.523-524). When Irwin fractured her hip in 1978, Mason, pursuant to a

power of attorney vested in her by Irwin, admitted that elderly lady into a hospital (Tr, p.525). From 1978 through 1983, Mason paid Irwin's bills and maintained her home by using Irwin's savings, dividends, and social security checks (Tr, p 529). Mason desired to be appointed Irwin's guardian (Tr, p 529).

On September 15, 1983, Mason and Respondent entered into an agreement (Exhibit 1), whereby she would pay him a $600.00 non-refundable retainer fee. In addition to the retainer fee, Mason was obligated to pay the attorney $350.00 per court appearance and reimburse him for costs. Respondent was required to represent Mason in her petition to be appointed conservator and guardian of Irwin's Estate.

In the petition for appointment as guardian, Mason listed the following assets: $4500 in real property; $400 in person property; and $858 in monthly income (Exhibit 5). The exhi-

bit shows that Irwin had three relatives, two nieces and a nephew. Irwin also owned bonds and stocks, but Respondent told Mason not to mention those assets while testifying in the Probate Court on the conservatorship petition (Tr, P 536). The Probate Judge did not specifically inquire about stocks and bonds owned by Irwin, and Mason did not volunteer the information (Tr, p. 536).

On June 26, 1984, Mason, as conservator of Irwin's Estate, assigned various rights to Respondent by way of a "power of attorney and assignment" document. Mason stated that she signed the document at the request of Respondent. The second paragraph of the document (Exhibit 7) provides:

> "I irrevocably appoint my attorney Fletcher J. Campbell, or his designee, my attorney-in-fact in the premises, to all acts, matters and things deemed necessary to desirable by any such authorized person, with full power and authority in my name, or that of the estate for the sole benefit of FLETCHER J. CAMPBELL to sue for, or compromise and to recover

> and receive all or part of the acquired lien granted by this assignment to secure his attorney fee and/or expenses, which said amount is equal to thirty--three and one third (33 1/3%) percent of any amounts realized through compromise, suit, judgments, administrative awards, entitlements, and demands."

After Mason was appointed conservator of the Estate and after she vested Respondent with the power of attorney and assignment, she appeared at Irwin's bank along with the niece of Irwin (Tr. p 540). The contents of a safety deposit box, including jewelry, bonds, and stock certificates, were given to Mason (Tr, pp 541-544). Mason thereupon met with Respondent at his law office to review the recently discovered assets of Irwin (Tr.p 541). When Respondent examined the assets, he exclaimed, "wow, these are worth a lot of money." (Tr. p 542).

In December of 1984, Mason, while accompanied by and at the recommendation of Respondent, sold the stocks and bonds (Tr, pp 544,

545, 547). Mason placed the proceeds of the sale, which she estimated to be in excess of $200,000, into a checking account at Comerica Bank (Tr, p 548). Mason, as the conservator of Irwin's Estate, was the sole signatory on the checking account (Tr, p 549).

Following the opening of the checking account, Respondent visited Mason at her home and removed two blank checks from the check-book (Tr. pp 550, 551). At a later date, Respondent unexpectedly arrived at Mason's place of employment, Providence Hospital, where he asked her to sign a $66,836.17 check (check #1002, Exhibit 11). Mason signed the pre-printed check, which named Respondent as the payee (Tr, pp 522-523). Mason claimed that she voiced a protest over the amount of the check, but Respondent informed here that "he deserved it to get paid." (Tr, p 553)

Respondent did not advise Mason that the approval of any individual or a Court was re-

quired in order for him to receive attorney fees from the Estate (Tr, p 555). Additionally, Respondent did not inform Mason of any potential liability she may incur to the Estate fro fees paid to an attorney in excess of those approved by the Probate Court (Tr, p 556). Respondent suggested that Respondent use or spend the Estate's funds "just like it was (her) money." (Tr, p 557). Mason issued a check to herself in the amount of $2000 in December of 1984.

Mason thereafter advised Respondent that she no longer wished for him to represent her (Tr. p 559). She retained Ira Auslander to represent her as conservator and guardian of the Estate (Tr, p 559).

On cross-examination, Mason testified that prior to retaining Respondent as her attorney, she withdrew approximately $6000 from Irwin's savings account (Tr, pp 606-607). She explained that the funds were used to pay

bills of Irwin (Tr, p 606). Bessie Irwin died in 1987 at the age of 95 (Tr, p 650).

Ira Auslander, a practicing attorney in Michigan since 1972, was retained by Ophelia Mason in January 1985. Mason informed Auslander that she was concerned about attorney fees that she, as Irwin's conservator, had paid Respondent. Mason further advised Auslander that she had been suspended as the conservator for failing to file an annual accounting with the Probate Court (Tr, p 371).

Before Auslander decided whether to represent Mason, he had a telephone conversation with Respondent. Auslander advised Respondent about Mason's displeasure with the attorney fees, to which Respondent said, "nobody (is) going to tell me what I can charge my clients." (Tr, p 370).

Auslander determined that the ideal strategy to recoup the allegedly excessive attorney fees paid by Mason to Respondent was

to file a petition seeking to have the fees repaid into the Estate (Tr, p 372). Auslander prepared and filed a petition and also notified Respondent, by letter, that Mason had discharged him as her attorney (Tr, p 372). On January 30, 1985, Auslander and his associate, Carol Trefry, served Respondent with a restraining order and petition to show cause (Exhibits 17 and 43; Tr, p 376).

The attorney f3e that Auslander determined was excessive was a payment by Mason to Respondent on December 4, 1984, in the sum of $66,836.17 (Exhibit 11, Tr, p 378). Following a hearing held in Wayne County Probate Court, Judge Robert Gragg found that the attorney fee was excessive. Judge Gragg held that Respondent was entitled only to $5048 for his representation of Ophelia Mason.

Auslander offered an opinion that Mason acted improperly in issuing the December 4 check to Respondent (Tr, p 380). He was con-

cerned over Mason's liability to the Estate for her imprudent issuance of the check to Respondent.

In a collection action filed by the State of Michigan against Respondent, Attorney Alan May was appointed as the receiver by the Wayne County Circuit Court Judge Richard Dunn on September 17, 1982 (Tr, pp 468-469; Ex.48). A judgment had been entered in favor of the State of Michigan against Respondent in the Common Pleas Court of Detroit on April 28, 1989 (Ex 48). Under the Order, May was authorized to marshall assets of Respondent to satisfy the judgment.

Except for a payment of $175 that he received from the debtor of Respondent, May was unable to collect the funds from Respondent (Tr, pp 478-480). The receivership was closed on May 23, 1989, because of the Receiver's inability to collect, with an outstanding balance of $4,693.57 (Tr, p 482). May testified

that Respondent was aware of the judgment against him and that a Receiver had been appointed to collect on the judgment (Tr, pp 469-470).

In an Amended Order dated May 9, 1985, Probate Judge Robert Gragg ordered that Respondent was entitled to $5048 in attorney fees and costs with respect to his representation of Ophelia Mason (Ex 46). The Order also required that:

> "Inasmuch as Respondent is presently in Receivership, said payment of fees, totaling $5048, is ordered directly to the Receiver, Alan A. May, Circuit Court No. 80-026735 AZ."

Respondent unsuccessfully appealed Judge Gragg's Amended Order to the Michigan Court of Appeals and the Michigan Supreme Court (Ex 19; Ex 20). As indicated, the Receivership was closed May 23, 1989, while the Michigan Supreme court denied Respondent's Application for Leave on February 17, 1988.

Called as an expert witness by the Peti-

tioner, Attorney John VonBatchelder was admitted to practice law in Michigan in 1937 (Tr, p 682). A specialist in probate law, VonBatchelder was familiar with the Irwin Estate based on his review of the various documents prior to testifying (Tr, pp 682-683).

He offered an opinion that the initial fee agreement (Ex 1) entered into between Mason and Respondent was the most unusual fee agreement he had examined during his years of practice (Tr, p 684). As to the power of attorney and assignment (Ex 8), VonBatchelder testified that it was improper for an attorney to enter into such an agreement, because the document gave all of the fiduciary's rights and responsibilities to Respondent and it, in essence, assigned the entire Estate to Respondent (Tr, pp 689-691). VonBatchelder stated that under the agreement, Respondent would be entitled to 1/3 of the Estate even if the fiduciary hired an attorney to replace Respon-

dent (Tr, p 693).

Accordingly to VonBatchelder, the two fee agreements entered into between Mason and Respondent were invalid, since the Probate Court is vested with the power to determine the appropriate attorney fees (Tr, P 696). He stated that contingency fee agreements, such as the one featured in Exhibit 8, are inappropriate in Probate cases (Tr, p 695).

The expert witness, on cross-examination, acknowledged that Probate Court Rule 908.3 governed attorney fees in probate cases in 1984 (Tr, p 726). Under that rule, an attorney fee could be awarded either at the direction of the Probate Court or if all affected parties consented to the fee. VonBatchelder noted that under the current rule, MCR 8.308, all attorney fees have to be approved by the Probate Court (Tr, p 728). VonBatchelder defined "affected parties" as presumptive heirs and other parties with an interest in the

Estate (Tr, p 865).

In VonBatchelder's opinion, the placement of $200,000 of the Estate's funds in a non-interest bearing account was imprudent, (Tr, p 700). He also testified that when an attorney receives notice that a temporary restraining has been signed by a Court prohibiting him from transferring or spending fees that he collected from a client, the attorney has to obey the Order (Tr, p 701). He testified that the Order and Opinion of the Court of Appeals directing Respondent to return funds to the Estate required compliance (Tr, p 702). Von Batchelder agreed with the decision of the Court of Appeals that Respondent charged Ophelia Mason an excessive fee (Tr, p 705). He further stated that it was incumbent upon Respondent to file a petition for instructions in the Probate Court after receiving notice of the Court of Appeals decision (Tr, p 710).

On cross-examination, VonBatchelder

offered specific bases concerning his opinion that the two fee agreements were either improper or excessive. He stated that a contingency fee is inappropriate because the Probate Court needs to determine the value of the attorney's representation (Tr, p 740). He referred to Disciplinary Rule 2-106(A), which prohibits an attorney from entering into a clearly excessive fee agreement (Tr, p 751). VonBatchelder stated that under PCR 908.3, the former rule regarding attorney fees, Respondent's $67,000 attorney fee was improper, for the presumptive heirs of Bessie Irwin's Estate (her two nieces and her nephew) and the nursing home (a creditor) did not consent to the fee (Tr, pp 726, 865-866, 893).

As to the non-refundable $600 required by the original fee agreement (Ex 1), Von Batchelder stated that it was improper because it was not approved by the Probate Court and it did not apply against any costs or legal

services (Tr, p 894). If a fiduciary approved or granted an excessive attorney fee, he or she would be responsible for reimbursing the Estate (Tr, pp 895-896).

Testifying as an expert witness for Respondent, Gerald D. White was admitted to practice law in Michigan in 1955 (Tr, p 1043). A general practitioner, White has had extensive experience in the area of Probate law, including service as a public administrator (Tr, pp 1043-1044).

White testified that under Probate Court Rule 908.3, approval for legal fees can be obtained in two ways: (1) court approval and (2) through the consent of the affected parties (Tr, p 1054). White stated that Respondent's charging of a fee of $200 per hour for his work in the Irwin Estate was reasonable, but that he had not opinion as to the validity of Respondent's contention that he expended 390 hours providing legal services to the Estate

(Tr, p 1046).

On cross-examination, White acknowledged that a waiver and consent form has to be signed by each "affected party". (Tr, p 1057). An attorney seeking approval of legal fees in a probate case should file a petition with the Court for instructions (Tr, pp 1061-1062). White expressed an opinion that it is improper for an attorney to request a non-refundable retainer fee, unless the fee will be applied toward legal fees or costs (Tr, p 1062). He also asserted that an attorney should not accept an exorbitant fee even if all of the affected or interested parties consent (Tr, p 1063). White testified that contingent fees in probate cases are never justified (Tr, p 1064).

William Taylor, an attorney employed by an insurance company, set forth the chronology of Shirley Wright's lawsuit to recover under an insurance policy (Tr, pp 995-996). Wright

suffered damages to real property as a result of a fire, but the insurance company refused to honor the claim because of an investigation that showed that the fire was deliberately set (Tr, p 996). A trial held in 1981 in the Common Please Court resulted in a verdict of $6000 for Wright, who was represented by Respondent (Tr, pp 996-997).

The verdict in Plaintiff's favor was memorialized in an amended order, reflecting a judgment in the amount of $7,428.87 (Ex 28; Tr, p 1001). The insurance company appealed to the Wayne County Circuit Court, which vacated the judgment and remanded the case to the Common Please Court for a new trial (Tr, p 997). The second trial, held in 1984, also resulted in a $6000 jury verdict for Wright (Tr, p 997). While the appeal was pending following the first trial, Respondent, as Wright's attorney, garnished funds from the insurance company's bank in order to collect

on the judgment (Tr, pp 997-998). Taylor complained that Respondent garnished the funds even though an appeal had been filed and an appropriate bond had been posted (Tr. p 998; Ex 29; Ex 57).

Taylor testified that his company obtained a temporary restraining order from Circuit Court Judge Richard Dunn on September 17, 1981 (Ex 34), which enjoined Respondent from negotiating the check issued on the garnishment (Tr, pp 1003-1004). The cashier's check, in the sum of $7,428.87, which was issued by the National Bank of Detroit to Wright and Respondent pursuant to the garnishment, was endorsed and cashed on September 16, 1981 (Ex 29).

The insurance company obtained an Order (Ex 35) from Judge Dunn on December 4, 1981, which vacated the Order of Garnishment issued by a Common Pleas Judge on September 16, 1981. On August 5, 1983, the insurance company was granted a summary judgment by Circuit Court

Judge Thomas Roumell (Ex 36) in its lawsuit to regain the funds that were garnished by Respondent and Wright on September 11, 1981 (Tr, p 1006). The company only was able to collect $540.47 on the summary judgement of $7,428.87 against Respondent, despite its attempts to garnish Respondent's bank accounts (Tr, p 1006). After Plaintiff was successful in the retrial, the insurance company paid Wright and Respondent $743.76 to satisfy the judgment in full (Ex 38).

Attorney James Gross represented the insurance company on appeal following the $6000 jury verdict in 1981. Gross filed a claim appeal and a surety bond in sum of $9000 (Tr, p 1017). Respondent and Gross disagreed over the amount of the bond, as Respondent contended that the bond should be twice the amount of the judgment (Tr, pp 1017-1018). Gross thereupon filed a motion in the trial court to stay proceedings and for a determination of the

appeal bond (Tr p 1018).

While the motion of Gross was pending the trial court, Respondent obtained a writ of garnishment, which he executed, against the insurance company (Tr, p 1020). In an attempt to thwart Respondent's attempts to garnish the insurance company's account, Gross obtained an ex-parte Order from Judge Dunn on September 17, 1981 (Ex 35), restraining Shirley Wright and Respondent from cashing or negotiating the cashier's check issued as a result of the writ of garnishment (Tr 1021). Respondent advised Gross that he would not return the funds ($7,428.87) that he obtained by way of the garnishment and that Gross would have to sue him in order to recoup the money (Tr, p 1022). Gross was able to obtain an Order vacating the garnishment on December 4, 1981 (Ex 35), but the Order did not require Respondent to return the funds that he gained as a result of the garnishment (Tr, p 1022).

Gross' involvement in the Shirley Wright vs. Group Insurance Company of Michigan case ended when the verdict in the first trial was overturned by the Wayne County Circuit Court (Tr, p 1024). Gross admitted that the judgment in favor of Wright (Ex 28) was the subject of an execution by Respondent before the bond on appeal was approved (Tr, p 1025). Gross asserted that a stay of proceeding should have resulted from his filing of a motion for a new trial and an appeal bond with the Court (Tr, p 1033).

Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a volunteer investigator in the Shirley Wright grievance (Tr, p 961). The grievance concerned Respondent's alleged failure to account for proceeds received from a breach of an insurance contract case litigated in the 36th District Court (Tr, p 961).

Karp interviewed Wright and Respondent

separately in April of 1987 (Tr, p 962). On July 13, 1987, Karp submitted a report to the Attorney Grievance Commission concerning his findings about the fee dispute (Tr, p 963).

According to Karp, Respondent stated that he (1) obtained a favorable jury verdict in the 36th District Court, which he reduced to a judgment; (2) collected on the judgment in September of 1981 through a garnishment procedure; (3) retained the funds in cash until disbursing them in February of 1987; and (4) kept the proceeds in cash at the request of Shirley Wright, who feared that the insurance company would recover the funds by way of a garnishment action (Tr, pp 968-969). Karp expressed an opinion that, under DR 9-102, a client's funds may not be held in cash, but must be deposited in an identifiable bank account (Tr, pp 990-991).

The final witness for Petitioner was Mary Sanders. Employed as the head teller at a

National Bank of Detroit branch, Sanders cashed the $7,428.87 cashier's check (Ex 29) for Respondent on September 16, 1981 (Tr, pp 1193-1195). Respondent was alone when he endorsed the check, which had earlier been endorsed by the co-payee, Shirley Wright (Tr, pp 1194-1195). The check was returned unpaid to the National Bank of Detroit, with a notation that it was "not used for purpose intended" (Tr, p 1196).

The proceeds from the check were distributed in the following manner; $2,828.98 was deposited in an account held by Respondent; $3,583.89 was deposited in a trust account of Respondent, and $1,016.00 was disbursed to Respondent in cash (Tr, pp 1199, 1202, 1207). The two bank account numbers of Respondent were written on the back of the cashier's check by Sanders (Tr, p 1196).

Respondent testified that he was admitted to practice law in Michigan in 1969 (Tr, p

205). A portion of his practice is devoted to probate cases (Tr, pp 206-207).

Respondent first met with Ophelia Mason on September 15, 1983, concerning Mason's handling of the personal affairs of an elderly woman, Bessie Irwin, who was living in a nursing home (Tr, pp 902-903). Mason was concerned about Irwin's declining physical condition and the escalating bills of Irwin that Mason was paying pursuant to a power of attorney granted to her by Irwin (Tr, p 903). Respondent suggested that Mason seek an appointment as the guardian and conservator of Irwin (Tr, p 905). Mason advised Respondent that Irwin had a limited income (Social Security benefits and nominal dividends) and a depleted savings account (Tr, p 907).

Mason entered into a fee agreement with Respondent (Ex 1), which provided that he would receive a $600 non-refundable retainer fee and a $350 payment for each court appear-

ance (Tr, pp 209, 908). In June of 1984, Mason informed Respondent that she could not afford to pay him $350 per court appearance (Tr, pp 924-925). Thereupon, Respondent suggested that she pay him on a contingency fee basis (Tr, p 925). A new fee agreement (Ex 8) entitled a "Power of Attorney and Assignment", was arrived at by Mason and Respondent (Tr, pp 228-231); 927). Through this agreement, Respondent acquired a one-third vested interest in Irwin's Estate (Tr, p 237).

Respondent admitted that he accepted a check, for legal services, from Mason in the sum of $66,836.17 (Ex 11). Shortly thereafter, without the approval of the Probate Court, Respondent cashed the check (Tr, pp 254-225; 1109). He claimed that he deposited more than $55,000 of the proceeds into his corporate account, receiving the balance in cash (Tr, pp 258-259; 265-266). Respondent asserted that he was entitled to a fee exceed-

ing $66,000, since under the power of attorney and assignment, Mason was obligated to pay him one-third of the Estate's assets (Tr, p 953). Respondent claimed credit for uncovering $1,000,000 worth of assets owned by Irwin (Tr, pp 2523; 1130-1131).

As to the Restraining Order (Ex 17) prohibiting Respondent from transferring, spending, or encumbering funds that he received from the Estate, Respondent testified that he did not disobey the Order because he had spent the money before January 31, 1985. He admitted that he had not complied with the Opinion of the Michigan Court of Appeals, which directed him to reimburse the Estate (Tr, pp 1160, 1190). He justified his inaction by stating that the Court of Appeals solely remanded the case to the Probate Court (Tr, p 1190).

Respondent contended that he did not provide false and misleading information to the Probate Court regarding his accounting of the

funds he derived from the Irwin Estate (Ex 14; Tr, pp 1135-1135; 1172-1174). He testified that he made $31,000 in cash payments to Lewis Love, Floyd Rickenbacker, and the State of Michigan (Tr, pp 1172-1174). Respondent lacked receipts supporting his claim that he made case payments to Love and Rickenbacker (Tr, p 1173).

Respondent admitted that he failed to obey the Order requiring him to make payments to the Receiver, because the latter had not poster a proper bond and because he "refused to be in servitude" (Tr, p 324).

With respect to the charges lodged by the Grievance Commission concerning Respondent's representation of Shirley Wright, Respondent denied that he violated a Restraining Order prohibiting him from transferring or disposing of the $7,428.87 cashier's check (Tr, p 1351). He cashed the check prior to receiving a copy of the Order, holding the funds in the form of

cash at the direction of Shirley Wright (Tr, p 1352). The money remained in his office safe until 1987 (Tr, p 1352).

Shirley Wright did not appear to testify on the fifth, and last, hearing date, despite having been served with a subpoena (Tr, p 1356). The competing attorneys made closing arguments and Petitioner's attorney filed a brief, in response to Respondent's brief, ten days after the closing arguments were heard.

V. Findings of Fact -- Case No. 25-88

(A) Count I -- Failure to file an Inventory and an Accounting

1. Respondent was discharged as Ophelia Mason's attorney before the annual accounting was due.

2. The duty to prepare and file an Inventory rests with the fiduciary, rather than the fiduciary's attorney, who is responsible for assisting the fiduciary.

3. Respondent testified unrebuttedly that Mason did not furnish him with the documentation he needed to assist her in preparing the Inventory.

CONCLUSION: Respondent did not commit professional misconduct as alleged in Court I of the formal complaint.

(B) Count II -- Charging and collection of excessive fees

1. Respondent entered into an initial fee agreement with Ophelia Mason on September 15, 1983, through which he charged and received a $600 non-refundable retainer.

2. The initial fee agreement shows that the client, Ophelia Mason, was responsible for all costs incidental to the probate case.

3. Contrary to the language contained in Exhibit 1, Respondent testified that he, rather than Mason, was responsible for

the costs related to the guardianship and conservatorship.

4. On June 26, 1984, a superseding fee agreement was arrived at by Mason and Respondent. From that date, Respondent was entitled to one-third contingency fee as to the Estate's assets.

5. The revised fee agreement gave Respondent a one-third vested interest in the Estate.

6. Mason signed the contingency fee agreement at the urging of Respondent.

7. Based on the expert witness testimony of John VonBatchelder and Gerald White, and on the reasoning of the Opinion of the Michigan Court of Appeals, the Master determines that a contingency fee agreement is prohibited in probate cases. The probate judge determines the appropriate attorney fee, based on numerous factors, including the experience of the attorney

and the complexity of the work.

8. Without the approval of the Probate Court, Respondent accepted a $66,836.17 fee from Ophelia Mason.

9. In accepting and cashing the $66,836.17 check, Respondent did not have the approval of the affected parties (the nursing home and Bessie Irwin's nieces and nephew).

10. Under PCR 908.3 (the applicable rule in 1983-84), an attorney may not accept an attorney fee in a probate matter unless he has either the approval of the Probate Judge or all of the affected parties.

11. Although Respondent did obtain a vested one-third interest in the Estate through the revised fee agreement (Ex 8), he did not deprive Mason of an opportunity to retain a substitute attorney, as evidenced by Ira Auslander's involvement

in the guardianship and conservatorship.

12. Respondent did not obtain the approval of either the Probate Court or the affected parties before accepting the $600 non-refundable retainer fee.

CONCLUSION: Respondent committed professional misconduct by (1) entering into a clearly excessive fee agreement (the contingency fee contained in Ex 8) with Ophelia Mason; (2) collecting the fee without the authority of either the Probate Court or the "affected parties;" and (3) collecting a $600 retainer fee without first seeking the approval of the Probate Court or the "affected parties". Petitioner did not preponderate on its allegation that Mason's right to retain substitute counsel was impeded by the contingency fee agreement.

(C) Count III -- Failure to obey an Order of Michigan Court of Appeals

1. On May 9, 1985, Probate Judge Gragg

held that Respondent was entitled to only $5048 for his representation of the guardian/conservator, Ophelia Mason.

2. Respondent appealed the Probate Court's decision to the Michigan Court of Appeals.

3. The Court of Appeals, on May 27, 1987, issued an Opinion, reversing the decision of the Probate Court and remanding the case to that Court. The appellate court determined that Respondent earned only $1657 in attorney fees.

4. Respondent has nominally complied with the Probate Court and Court of Appeals directives regarding his obligation to reimburse the Estate for the excessive legal fees that he received, reimbursing the Estate in the sum of $1357.

5. Respondent and Ophelia Mason's attorney each had a duty to file a Peti-

tion for Instructions in the Probate Court following the remand of the Court of Appeals.

CONCLUSION: Respondent disregarded the Order of the Michigan Court of Appeals, which indirectly ordered him to return the excessive fees to the Estate. Respondent had a duty to reimburse the Estate pursuant to the Probate Court's Order of May 9, 1985. Respondent acted improperly in making only a woefully minimal effort to reimburse the Estate after receiving adverse rulings from the Probate Court and the Court of Appeals.

(D) Count IV -- Violation of A temporary Restraining Order

1. On January 31, 1985, Probate Judge Gragg signed a Temporary Restraining Order, enjoining Respondent and Respondent's law firm from transferring, spending, or encumbering any funds received from the Estate of Bessie Irwin.

2. Respondent was served with a copy of the Restraining Order on January 31, 1985.

3. Respondent withdrew $9000 from his law firm's checking account, at Comerica Bank-Detroit, on February 1, 1985 (Ex 12).

4. The record shows that the $9000 was part of a $55,836.17 deposit made by Respondent on December 5, 1984, at Comerica Bank-Detroit (Ex 12). The deposit was generated by a $66,832.17 check (Ex 11) that Respondent requested and received from the Estate's conservator, Ophelia Mason, on December 5, 1984.

CONCLUSION: Respondent knowingly violated an Order of the Probate Court by transferring funds on February 1, 1985, that he received from Bessie Irwin"s Estate.

(E) Count V -- The making of false statements to the Probate Court

1. On September 10, 1986, Respondent was ordered by the Probate Court to account for the money received from the Irwin Estate.

2. Respondent filed an accounting on September 23, 1986.

3. Respondent claimed, among other things, that he made case payments in December, 1984, and January, 1985, to Lewis Love ($14,000), Floyd Rickenbacker ($10,000), and the State of Michigan ($7500).

4. Respondent testified that he made the foregoing cash payments, but that he had cash receipts only from the State of Michigan.

5. Petitioner did not meet its burden of disproving Respondent's claim that he made cash payments totaling $31,500 to Love, Rickenbacker, and the State of Michigan with funds he

gained from the Irwin Estate.

CONCLUSION: Respondent did not make any material misstatements to the Probate Court in his accounting of September 23, 1986.

(F) Count IV -- Failure to pay or turn over assets to the Receiver

1. On April 28, 1980, a judgment was entered in the Common Pleas Court against Respondent in favor of the State of Michigan, Department of Treasury.

2. On September 17, 1982, an Order Appointing a Receiver, Alan May, was signed by Wayne County Circuit Court Judge Richard Dunn, authorizing the Receiver to marshall the assets of Respondent in order to satisfy a Judgment in the sum of $1,360.74 plus costs and interest.

3. The Receiver only collected $175.00 through his efforts to marshall the assets of Respondent.

4. The Receivership was closed on May 23, 1989, with a balance of $4,693.57, on account of the Receiver's inability to obtain any of Respondent's assets.

5. Respondent was served with a copy of the Order Appointing a Receiver.

6. On May 9, 1985, Probate Judge Robert Gragg ordered Respondent to turn over his approved legal fee $5048, to the Receiver, an Order with which Respondent did not comply.

7. In Count VI of the formal complaint, Petitioner did not allege that Respondent violated Judge Gragg's Order of May 9, 1985.

CONCLUSION: Respondent did not commit professional misconduct in failing to turn over his assets to the Receiver. Judge Dunn's Order did not affirmatively require Respondent to pay money to Alan May; rather, it empowered May to collect on a judgment against Respon-

dent. The failure to satisfy a judgment by an attorney certainly is not laudable or justifiable, but does not constitute misconduct. An Order that may have been violated by Respondent in regard to the Receivership was Judge Gragg's Order dated May 9, 1985, but that violation is not part of the allegations embraced in Count VI of the formal complaint.

VI. Findings of Fact -- Case No. 133-88

(A) Count I -- Improper handling of a client's funds

1. Respondent successfully litigated a fire insurance claim in the Common Pleas Court, earning a judgment in the sum of $7,428.87 for Shirley Wright.

2. The insurance company appealed the judgment entered on the verdict, but Respondent collected on the judgment by way of a garnishment procedure before the case was formally stayed by the Common Pleas Court or the Wayne County Circuit

Court.

3. Respondent endorsed and cashed the garnishment check on September 16, 1981.

4. When Respondent negotiated the $7,428.87 cashier's check at the National Bank of Detroit, he deposited $3,583.89 in a trust account and another $2,828.98 in a second account, while receiving $1,016 in cash.

5. As to the $3,583.89 deposit into his trust account, Respondent withdrew all but $198.02 in 1981 and 1982.

6. Respondent did not pay any interest to Shirley Wright with respect to the funds he derived from the judgment entered in favor of Wright.

CONCLUSION: Respondent violated DR 9-102 (A) by not depositing Shirley Wright's funds, derived from a judgment, in an identifiable bank account. He also misappropriated Wright's funds by depositing part of them into

his own account, withdrawing part of them from his trust account, and by receiving the remainder in ~~cash.~~ The other allegations contained in Court I, Paragraph K either were not proven by Petitioner or constitute factual, instead of legal, averments.

(B) Count II -- Violation of a Temporary Restraining Order

1. On July 16, 1981, an Amended Judgment was entered in favor of Shirley Wright, Respondent's client, in the Common Pleas Court in the sum of $7,428.87.

2. The insurance company appealed the judgment, but was unable to obtain a stay of proceedings before Respondent garnished the bank account of the insurance company.

3. Pursuant to a writ of garnishment served by Respondent, the insurance company's bank issued a cashier's check to Respondent and Shirley Wright on

September 16, 1981.

4. Respondent negotiated the cashier's check at the National Bank of Detroit on September 16, 1981, depositing part of the $7,428.87 in two accounts, while receiving the remainder in cash.

5. On September 17, 1981, Circuit Court Judge Richard Dunn Entered a Temporary Restraining Order at the request of the insurance company, prohibiting Respondent from negotiating the garnishment check.

CONCLUSION: Respondent did not violate Judge Dunn's Temporary Restraining Order of September 17, 1981, because he negotiated the check one day before the Restraining Order was issued.

(C) Count III--False statements made in connection with a Request for Investigation

1. Ronald Karp, an attorney, was appointed by the Attorney Grievance Commission to serve as a Volunteer Investigator

regarding a Grievance filed by Shirley Wright against Respondent.

2. As part of his duties, Karp interviewed Respondent in April of 1987.

3. Karp prepared a Report embracing his findings, but the document was not introduced as an exhibit at the hearing.

4. Respondent advised Karp that he retained all of the proceeds derived from the judgment in cash, at Wright's request.

5. Since Shirley Wright did not testify, it cannot be shown that Respondent falsely informed Investigator Karp that Wright asked him to hold the funds in cash in order to avoid a garnishment.

6. Respondent falsely reported to Investigator Karp that he held the proceeds derived from the cashier's check of September 16, 1981, along with other bank exhibits, reveal that Respondent deposit-

ed $6,412.87 of the $7,428.87 in two accounts, receiving the remainder in cash. Subsequent to that transaction, he withdrew all but $198.02 from his trust account. Thus, Respondent did not keep the proceeds of the garnishment check at his office, as he represented to Karp.

CONCLUSION: Respondent committed professional misconduct by knowingly providing false information to a Volunteer Investigator of the Attorney Grievance Commission who was investigating a grievance filed against Respondent.

VII. Conclusions of Law -- Case No. 25-88

Respondent committed professional misconduct in the following ways:

1. By collecting a $600 non-refundable retainer fee without obtaining either the approval of the Probate Court or the affected parties (as required by Probate Court Rule 908.3), in violation of DR 2-106(A) and (B), and MCR 9.104(1-4).

2. By charging and, without the approval of the Probate Court or the affected parties (as required by PCR 908.3), collecting a clearly excessive fee; a one-third contingency fee, in violation of DR 2-106(A) and (B), and MCR 9.104 (1-4).

3. By violating an Order and Opinion of the Michigan Court of Appeals which directed him to take steps to reimburse the Irwin Estate for excessive fees that he received, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104(1-4).

4. By knowingly violating an Order of the Wayne County Probate Court, dated February 1, 1985, which enjoined him from transferring or spending funds that he received through the Irwin Estate, in violation of DR 7-106(A), DR 1-102(A)(5), and MCR 9.104 (1-4).

The other allegations contained in the

formal complaint, namely, the failure to file an Inventory and an Accounting, the encumbering of the fiduciary's right to retain a substitute attorney, the making of false statements to the Probate Court, and the failure to turn assets over to the Receiver, were not proven by a preponderance of the evidence. Respondent's affirmative defenses were not proven and, in fact, were not seriously advanced.

VIII. Conclusions of Law -- Case No. 133-88

Respondent committed professional misconduct in the following manner:

1. By failing or neglecting to deposit the funds of a client, Shirley Wright, which he obtained through the collection of a judgment, in an identifiable bank account, in violation of DR 9-102(A), Dr 1-102(A) (4-5), and MCR 9.102(1-4).

2. By misappropriating the funds of a client, Shirley Wright, in violation of

DR 9-102(A), Dr 1-102(A) (4-5), and MCR 9.102(1-4).

3. By knowingly providing false information to a Volunteer Investigator assigned by the Attorney Grievance Commission to investigate a grievance filed against Respondent, in violation of DR 1-102(A) (4-5) and MCR 9.103(3)(4)(6).

The other allegations embraced in the formal complaint were not proven by a preponderance of the evidence. Respondent's affirmative defenses were not proven.

ATTORNEY DISCIPLINE BOARD

By_____

Steven M. Kaplan, Master

Dated: November 2, 1989

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: May 31, 1991

91111(6)(7)(8)

GRIEVANCE ADMINISTRATOR, STATE OF MICHIGAN, ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellee,
Cross-Appellant,

v

SC: 91111
ADB: 25-88, 133-88
AGC: 51/87, 90/88

FLETCHER J. CAMPBELL,

Respondent-Appellant,
Cross-Appellee.

On order of the Court, the motion for immediate consideration is considered, and it is GRANTED. The motion for reconsideration of this Court's order of March 22, 1991 is considered, and it is DENIED because it does not appear that the order was entered erroneously. The motion for stay is DENIED as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

May 31, 1991 _____ Clerk

Michigan Supreme Court
Lansing, Michigan

ORDER

Entered: March 22, 1991

91111(6)(7)(8)

GRIEVANCE ADMINISTRATOR, STATE OF MICHIGAN, ATTORNEY GRIEVANCE COMMISSION,

Petitioner-Appellee,
Cross-Appellant,

v

SC: 91111
ADB: 25-88, 133-88
AGC: 51/87, 90/88

FLETCHER J. CAMPBELL,

Respondent-Appellant,
Cross-Appellee.

On order of the Court, the motions for immediate consideration are considered, and they are GRANTED. The motion for application for leave to appeal as cross-appellant also are considered, and they are DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

The motions for stay are DENIED, as moot.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

March 22, 1991 _____ Clerk

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.
_____/

SUPPLEMENT TO ORDER DENYING MOTIONS FOR RECONSIDERATION

Considered by the Attorney Discipline Board
One Kennedy Square, Suite 1910, Detroit, MI

PRESENT: Hanley M. Gurwin, Chairman

On November 15, 1990, the Attorney Discipline Board entered its order granting the stay of discipline requested by the respondent. That order further provided that the stay of discipline should remain effective for twenty-one (21) days after the entry of an order granting or denying reconsideration.

On February 25, 1991, the Board entered its order in this matter denying the motions for reconsideration filed by the respondent

and the Grievance Administrator.

NOW, THEREFORE, in accordance with the Board's order of November 15, 1990 and the provisions of MCR 9.118(D),

IT IS ORDERED that the stay of discipline granted by the Board in this matter effective November 15, 1990 shall remain effective for twenty-one (21) days following entry of the Board's order denying motions for reconsideration on February 25, 1991.

IT IS FURTHER ORDERED that the respondent's suspension from the practice of law as ordered by the Attorney Discipline Board shall become effective March 19, 1991, or unless otherwise ordered by the Board or the Supreme Court.

ATTORNEY DISCIPLINE BOARD

By_____
Hanley M. Gurwin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ORDER REDUCING DISCIPLINE

Considered by the Attorney Discipline Board
One Kennedy Square, Suite 1910, Detroit, MI

PRESENT: John F. Burns
Hon. Martin M. Doctoroff
Remona A. Green
Robert S. Harrison
Linda S. Hotchkiss, M.D.
Theodore P. Zegouras

The Attorney Discipline Board has considered the Petition for Review filed by the respondent seeking review of a hearing panel order of revocation filed in this matter. The Board conducted review proceedings in accordance with MCR 9.118 and has concluded that the discipline imposed should be reduced from revocation to a three-year suspension, and being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the SUSPENSION OF RESPONDENT'S FOR A PERIOD OF THREE (3) YEARS SHALL COMMENCE November 16, 1990. Respondent shall remain suspended until further order of the Supreme Court, the Attorney Discipline Board or a hearing panel.

IT IS FURTHER ORDERED that for purposes of any further appeal, this order shall be deemed effective November 16, 1990.

IT IS FURTHER ORDERED that all provisions of the Order of Revocation filed by the hearing panel shall remain in full force and effect except as modified.

ATTORNEY DISCIPLINE BOARD

By_____
Hanley M. Gurwin, Chairman

State of Michigan

ATTORNEY DISCIPLINE BOARD

Grievance Administrator,
State of Michigan
Attorney Grievance Commission,

Petitioner,

ADB 25-88;133-88

v

Fletcher J. Campbell, P11544

Respondent.

_____/

ORDER OF REVOCATION

Considered by the Attorney Discipline Board
Wayne County Hearing Panel #11

PRESENT: David I. Rosin, Chairman
Arthur J. Tarnow, Member
Dawn A. VanHoek, Member

This matter having come before the panel upon the filing of Formal Complaints ADB 25-88 and ADB 133-88 which were consolidated for hearing. This matter was referred to a master for findings of fact, and that report containing the findings and conclusion that misconduct had been established by a preponderance of the evidence, and the panel having conducted a hearing on the level of discipline to be imposed on January 18, 1990 and having fil-

ed that report, and being otherwise advised;

NOW THEREFORE,

IT IS ORDERED that the license to practice law of respondent Fletcher J. Campbell is REVOKED COMMENCING March 23, 1990 until further order of the Supreme Court, the Attorney Discipline Board of a hearing panel and until respondent complies with the requirements of MCR 9.123(B) and MCR 9.124.

IT IS FURTHER ORDERED that from the effective date of this Order and until reinstatement in accordance with the applicable provisions of MCR 9.123, Respondent is forbidden from practicing law in any form; appearing as an attorney before any court, judge, justice, board, commission or other public authority; or holding himself out as an attorney by any means.

IT IS FURTHER ORDERED that Respondent shall, within seven (7) days of the effective date of this Order, notify all of his acti e clients, in writing, by registered mail,

return receipt requested, of the following:

1) the nature and duration of discipline imposed;

2) the effective date of such discipline;

3) respondent's inability to act as an attorney after the effective date of such discipline;

4) the location and identity of the custodian of the clients' files and records which will be made available to them or to substitute counsel;

5) that the client may wish to seek legal advise and counsel elsewhere; provided that if respondent is a member of a law firm, the firm may continue to represent each client with the client's express written consent;

6) the address to which all correspondence to respondent may be addressed.

IT IS FURTHERED ORDERED that in accor-

dance with MCR 9.119(B), Respondent must, by the effective date of this Order, in every matter in which Respondent is representing a client in litigation, file with the tribunal and all parties a notice of Respondent's disqualification from the practice of law.

IT IS FURTHER ORDERED that Respondent shall, within fourteen (14) days of the effective date of this Order, file with the Grievance Administrator and the Attorney Discipline Board an Affidavit of Compliance as required by MCR 9.119(C)(eff. June 1, 1987).

IT IS FURTHER ORDERED that Respondent's conduct after the entry of this Order but prior to its effective date, shall be subject to the restrictions set forth in MCR 9.119(D) (eff. June 1, 1987); and Respondent's compensation for legal services shall be subject to the restrictions described in MCR 9.119(F) (eff. June 1, 1987).

IT IS FURTHER ORDERED that Respondent shall, within 180 days of the effective date of this Order, pay costs in the amount of

$5979.83. Cost payments shall be made payable to the State Bar of Michigan but submitted to the Attorney Discipline Board [One Kennedy Square, Suite 1910, Detroit, MI 48226] for proper crediting. Failure to reimburse the State Bar of Michigan within the time prescribed will result in Respondent's automatic suspension from the practice of law in accordance with MCR 9.128. (eff. June 1, 1987).

ATTORNEY DISCIPLINE BOARD
Wayne County Hearing Panel #11

By_____
David I. Rosin, Chairman

600.2146 Record made in regular course of business; surrounding circumstances; lack of entry; photostatic reproduction

Sec. 2146. Any writing or record whether in the form of an entry in a book or otherwise, made as a memorandum of any act, transaction, occurrence or event shall be admissible in evidence in all trials, hearings and proceedings in any cause or suit in any court, or before any officer, arbitrators, or referees, in proof of said act, transaction, occurrence or event if it was made in the regular course of any business and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record including lack of personal knowledge by the entrant or maker, may be shown to affect its weight but not its admissibility. The term "business" shall include business, profession, occupation and calling of every kind. The lack of an entry regarding any act, transaction, occur-

rence or event in any writing or record so proved may be received as evidence that no such act, transaction, occurrence or event did, in fact, take place. Any photostatic or photographic reproduction of any such writing or record shall be admissible in evidence in any such trial, hearing or proceeding by order of the court, made within its discretion, upon motion with notice of not less than 4 days. All circumstances of the making of such photostatic or photographic reproduction may be shown upon such trial, hearing or proceeding to affect the weight but not the admissibility of such evidence. P.A.1961, No.236, §2146, Eff. Jan 1, 1963.

RULE 2.203 JOINDER OF CLAIMS, COUNTERCLAIMS, AND CROSS-CLAIMS

(B) Permissive Joinder. A pleader may join as either independent or alternate claims as many claims, legal or equitable, as the pleader has against an opposing party. If a claim is one previously cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court may grant relief only in accordance with the substantive rights of the parties.

RULE 2.312 REQUEST FOR ADMISSION

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be

served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested must be stated separately.

RULE 2.504 DISMISSAL OF ACTIONS

(B) Involuntary Dismissal; Effect.

(1) If the plaintiff fails to comply with these rules or a court order, a defendant may move for dismissal of an action or a claim against that defendant.

(2) In an action tried without a jury, after the presentation of the plaintiff's evidence the defendant, without waiving the right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff, or may decline to render judgment on the merits against the plaintiff, the court shall make findings as provided in MCR 2.517.

RULE 2.505 CONSOLIDATION; SEPARATE TRIALS

(A) Consolidation. When actions involving a substantial and controlling common question of law or fact are pending before the court, it may

(1) order a joint hearing or trial of any or all the matters in issue in the actions;

(2) order the actions consolidated; and

(3) enter orders concerning the proceedings to avoid unnecessary costs or delay.

RULE 7.210 RECORD ON APPEAL

(1) Return of Record. After the Court of Appeals disposes of an appeal and the period for a timely application for leave to appeal to the Supreme Court has expired without the filing of an application, the Court of Appeals shall promptly return the original record to the clerk of the court or tribunal from which it was received, together with a certified copy of the opinion, judgment, or order entered by the Court of Appeals.

(J) Notice by Trial Court or Tribunal Clerk. The trial court or tribunal clerk shall promptly notify all parties of the return of the record in order that they may take the appropriate action in the trial court or tribunal under the Court of Appeals mandate.

RULE 7.215 OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FROM COURT OF APPEALS

(F) Execution and Enforcement.

(1) Routine Issuance. Unless otherwise ordered by the court or otherwise provided by these rules, execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[I] or by the Supreme Court clerk under MCR 7.311[B] with a certified copy of the court's judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

RULE 8.121 CONTINGENT FEES IN CLAIMS OR ACTIONS FOR PERSONAL INJURY AND WRONGFUL DEATH

(A) Allowable Contingent Fee Agreements. In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, in which an attorney enters into an agreement, expressed or implied, whereby the attorney's compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a "clearly excessive fee" in violation of Canon 2, DR 2-106(A) of the Code of Professional Responsibility and Canons.

(B) Maximum Fee. The maximum allowable fee for the claims and actions referred to in

subrule (A) is one-third of the amount recovered.

* * * *

(F) Agreements to Be in Writing. Contingent fee arrangements made by an attorney with a client must be in writing and a copy provided to the client.

RULE 8.303 COMPENSATION OF ATTORNEYS

An attorney is entitled to receive reasonable compensation for services rendered to an estate, in an amount approved by the judge having jurisdiction over the estate. Except when the compensation is consented to by all the parties affected, the attorney must append to an accounting, petition, or motion in which compensation is claimed a written description of services performed, a summary of the work done by the attorney, and any other information that may be helpful to the court in determining compensation. This rule does not apply to independent probate proceedings under

Chapter 3 of the Revised Probate Code

[Amended effective March 1, 1985.]

Staff Comment

MCR 8.303 is based on PCR 908.3

Th rule requires court approval of attorney fees in probate estate proceedings.

RULE 9.110 ATTORNEY DISCIPLINE BOARD

(A) Authority of Board. The Attorney Discipline Board is the adjudicative arm of the Supreme Court for discharge of its exclusive constitutional responsibility to supervise and discipline Michigan attorneys.

* * * *

(C) Internal Rules.

(1) The board must elect annually from among its membership

* * * *

(c) a secretary to keep the minutes of the board's meetings and issue the required notices.

(2) Four members constitute a quorum. The board acts by majority vote of the members present.

* * * *

(4) A special meeting may be called by the chairperson or by petition of 3 board members on 7 days written notice. The notice may be waived in writing or by attending the meeting.

(D) Powers and Duties. The board has the power and duty to

(1) appoint an attorney as its counsel;

(2) appoint hearing panels and masters;

(3) on the filing of a complaint, assign it to a hearing panel or to a master if it appears that the hearing will be a prolonged one;

(4) on request of an aggrieved party, review a final order of discipline or dismissal by a hearing panel;

(5) discipline and reinstate attorneys under these rules;

(6) file with the Supreme Court clerk its orders of suspension, disbarment, and reinstatement;

(7) annually write a budget for the board and submit it to the State Bar Board of Commissioners for approval; and

(8) submit to the Supreme Court proposed changes in these rules.

RULE 9.111 HEARING PANELS

(B) Powers and Duties. A hearing panel shall do the following:

(1) Hold a public hearing on a complaint or reinstatement petition assigned to it within 56 days after the date the complaint is filed with the board or the date that notice of the reinstatement petition is published. A hearing must be concluded within 91 days after it is begun, unless the board grants an extension for good cause.

(2) Receive evidence and make written findings of fact.

(3) Discipline and reinstate attorneys or dismiss a complaint by order, under these rules.

(4) Report its actions to the board within 28 days after the conclusion of a hearing.

(5) Perform other duties provided in these rules.

RULE 9.114 ACTION BY ADMINISTRATOR OR COMMISSION AFTER ANSWER

* * * *

(C) Subpoenas.

(1) On request of the administrator or the respondent, the commission may issue subpoenas to require the appearance of a witness or the production of documents and other things before the administrator or an investigator concerning matters then under investigation.

RULE 9.115 HEARING PANEL PROCEDURE

(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in the non-jury civil action apply to a proceeding before a hearing panel.

* * * *

(F) Prehearing Procedure.

(4) Discovery. Pretrial or discovery proceedings are not permitted except as follows:

(a) Within 21 days of the service of a formal complaint, a party may demand in writing that documentary evidence that is to be introduced at the hearing by the opposing party be made available for inspection or copying. Within 14 days after service of a written demand, the documents shall be made available, provided that the administrator need not comply prior to the filing of the respondent's answer. The respondent shall comply with the written demand within 14 days, except that the respondent need not

comply until the time for filing an answer to the formal complaint has expired. Any other documentary evidence to be introduced at the hearing by either party shall be supplied to the other party no later than 14 days prior to the hearing. Any documentary evidence not so supplied shall be excluded from the hearing except for good cause shown.

(d) The hearing panel may order a prehearing conference held before a panel member to obtain admissions or otherwise narrow the issues presented by the pleadings.

RULE 9.126 OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS

(A) Investigations. Investigations by the administrator or the staff may not be made public. At the respondent's option, final disposition of a request for investigation not resulting in formal charges may be made public.

(B) Hearings. Hearings before a hearing panel and the board must be open to the public, but not their deliberations.

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public.

(D) Other Records. Other files and records of the board, the commission, the administrator, legal counsel, hearing panels and their members, and the staff of each may not be examined by or disclosed to anyone except

(1) the commission,

(2) the administrator,

(3) the respondent as provided under MCR 9.115(F)(4),

(4) members of hearing panels or the board,

(5) authorized employees,

(6) the Supreme Court, or

(7) other persons who are expressly authorized by the board or the Supreme Court.

If a disclosure is made to the Supreme Court, the board, or a hearing panel, the information concerning attorney or judicial misconduct to the Judicial Tenure Commission, the State Bar of Michigan Client Security Fund, the State Bar of Michigan Committee on Judicial qualifications, and any court-authorized attorney disciplinary or admissions agency.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly;

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to a tribunal controlling legal authority in the jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the

offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

(c) engage in conduct that is prejudicial to the administration of justice;

RULE 103. RULINGS ON EVIDENCE

(d) Plain Error. Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.

Note

MRE 103 is identical with Rule 103 of the Federal Rules of Evidence.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, or events, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of

information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Note

MRE 803 is identical with Rule 803 of the Federal Rules of Evidence except:

(2) MRE 803(6) is identical with Federal Rule 803(6) except that the phrase "acts, events, conditions, opinions, or diagnosis" is replaced by the phrase "acts, transactions, occurrences, or events".

HURWITZ, KARP, HIRSCHMAN & WALLACE, P.C.
Attorneys and Counsellor
8283 North Telegraph Road
Dearborn Heights, Michigan 48127

(313) 276-7030

July 13, 1987

Attorney Grievance Commission
Suite 256 - Marquette Building
243 W. Congress
Detroit, MI 48226

Attn: William E. Lang

Re: File No. 0004/87
Shirley A. Wright as to
Fletcher J. Campbell

Dear Mr. Lang:

I received the above file as a volunteer investigator to inquire into the matter and report to your office at the conclusion of my investigation. This letter is my report.

- On December 29, 1986, Shirley Wright filed her Request for Investigation of respondent. Essentially, her complaint was that respondent refused to account for approximately $7,600 he received on her behalf as a result of litigating a fire loss claim on an insurance policy issued by AAA. Initial litigation

was by trial in 36th District Court in 1979 resulting in a jury verdict in favor of Shirley Wright.

- On January 9, 1987, the Attorney Grievance Commission forwarded the Request for Investigation.

- On February 6,1 987, respondent distributed funds held on behalf of Ms. Wright; the gross amount was $7,668.15 of which $2,933.85 were attorney fees (one-third) and $4,734.30 as the net proceeds of the claim to client.

Ms. Wright's Request for Investigation complained that respondent failed to account to her when he received the funds ultimately disbursed and he refused to disburse them for many years. She also complains that she did not receive interest on $7,428.87 which respondent had been holding since September 1981.

The undersigned reviewed the file received from your office, interviewed Shirley

Wright on April 11, 1987, interviewed respondent on April 13, 1987, held a second interview with respondent on April 25, 1987, and conducted a telephone conference with William Taylor at AAA's attorney office on May 11, 1987. The undersigned also reviewed additional documents provided by Shirley Wright pertaining to the litigation handled by respondent which consisted of miscellaneous pleadings and settlement statement. A review of the Code of Professional Responsibility was also conducted.

The following historical events are relevant to this matter.

1. In 1979 respondent entered a judgment in favor of Ms. Wright in 36th District Court, upon a jury verdict of $6,000 plus interest, for her damages in a fire loss in 1976. The claim arose out of the insurance policy issued by AAA.

2. September 1981 respondent received $7,422.87 pursuant to a Writ of Garnishment

upon National Bank of Detroit (garnishee defendant) as a result of the Writ of Garnishment served to collect the Judgment of 1979 against AAA.

3. Ms. Wright claims that respondent failed to disclose the receipt of the garnishment funds, made no accounting to her and made no disbursement upon receipt.

4. On September 17, 1981, an Ex Parte Order was entered in the Wayne County Circuit Court (at the request of AAA on their appeal of the Judgment entered in 1979 in 36th District Court) providing that "... SHIRLEY WRIGHT and/or FLETCHER J. CAMPBELL. ... be ... ENJOINED from disposing of the proceeds from same (proceeds of the Writ of Garnishment in the amount of $7,428.87) pending the further order of this Court;..."

5. Respondent claims that Ms. Wright knew that he had collected the funds and requested that the hold the $7,428.87 in cash so that they would not be subject to garnishment

by AAA. Shirley Wright denies any such knowledge and denies that she had any accounting from respondent regarding the funds.

6. Respondent states that he held $7,428.87 in the form of cash from September 9181 until disbursed to Ms. Wright in February 1987.

7. In September 1986 the fire loss claim was retried in 36th District Court resulting in a verdict in favor of Ms. Wright in the principal sum of $6,000. Interest upon the principal sum was denied because respondent held ~~AAA's~~ money, in full satisfaction of the prior judgment, since September 1981.

8. In 1982 AAA filed a Circuit Court action against Shirley Wright and respondent to recover the garnishment funds which it claimed respondent obtained in violation of an order staying proceedings on the appeal of the 1979 36th District Court Judgment. A Default Judgment was entered against Shirley Wright and respondent for $7,428.87, plus interest

and costs. AAA received $504.48 from a Writ of Garnishment upon a bank account of respondent.

9. After the $6,000 Judgment of September 19, 1986 (retrial of the fire loss claim) the 36th District Court denied any interest upon said sum and the claim was finally settled between respondent and the AAA attorney on October 21, 1986. As of October 21, 1986, respondent held a total of $7,668.15 representing adjusted gross proceeds of claim after deducting the amount AAA garnishment against respondent's funds.

10. The Request for Investigation was prompted by respondent's refusal to account for the funds he held and his refusal to disburse the same. Respondent claims that he strongly urged Ms. Wright to appeal the denial of interest upon the $6,000 Judgment of September 1986. He further claims that her signature on the final settlement statement of February 6, 1987 waives any claim to interest

and abandons all efforts to appeal. Respondent claims that, only upon Ms. Wright's consent to abandon the appeal and waiver of interest (on February 6, 1987) could he then finally disburse the funds to her.

This case involves a credibility issue as to what respondent told his client in 1981 after receiving funds on her behalf and what instructions she gave him. It is highly unusual to hold $7,428.87 in the form of cash from September 1981 to February 1987. Respondent was unable to specifically identify the physical location of the case; e.g. safe deposit vault, desk drawer, office safe, etc. If there was any misconduct on the part of respondent it would be a violation of DR 9-102 "Preserving Identity of Funds and Property of a Client". There may have also been a violation of DR 4.101(B)(3) pertaining to the violation of confidences of a client for the advantage of himself.

In final summary, it appears that respondent had the use of $7,428.00 from September 1981 until February 1987. Those funds did not draw any interest and none was distributed to Ms. Wright. The fact that the respondent held those funds since September 1981 was the basis of the 36th District Court's denial of interest on the principal judgment of $6,000 after the retrial in September 1986. The only one who lost the interest was the client. The attorney had the use of the funds during that time. Had the money been invested at an annual rate of 6% for the six year period there would have been an additional $2,476.00 available for disbursement; two-thirds of which would be the property of the client.

Ms. Wright was reluctant to continue with her Request for Investigation if that would result in discipline for respondent. She expressed an interest in obtaining a more complete accounting of her claim and collection of interest.

If there is any further service I can perform in this matter please do not hesitate to contact me.

Very truly yours,

Ronald Karp

RK:djm

ADDITIONAL SPECIFIED MATERIAL UNDERLYING FEDERAL QUESTIONS RAISED IN STATE COURT
[See, Sup.Ct.R. 1.(h) and (k)]

The questions presented for review to this Honorable Court were raised by the Petitioner at the first opportunity by formal pleadings. Specifically the federal questions with respect to the appointment of a Master while a panel was in place was first raised when the Order appointing a Master was entered on December 23, 1988, and subsequently the relief sought by the Petitioner was denied on May 8, 1989. Even before the Master issue evolved federal questions were raised before the assigned hearing panel by written motion on April 15, 1988 with respect to violation of due process concerning the failure to convene a "public hearing" on Formal Complaint ADB 25-88 within the prescribed and mandated 56 day rule of MCR 9.111 (B). The panel assigned to hear the matter on the Petitioner's Motion To Dismiss did not rule on this dispositive motion, but instead, on October 27, 1988, entered its Order taking the motion under

advisement. The panel never issued any adjudication on this motion even though the panel subsequently issued its Report and Order of Revocation. Thus, the panel did not address the due process issue raised by the Petitioner which it purportedly had taken under advisement back on October 27, 1988. Each of the foregoing federal questions were presented to the Board on review, including the additional federal questions concerning (1) the unconstitutionality of the Michigan scheme of attorney discipline, (2) the alteration of evidence secured secretly by the Respondent during the Pre-Formal Complaint stage by subpoena issued by the Respondent and not the Board, (3) the denial of a fair trial where unexcised evidence was placed in the record even though the Master had ordered its excision, (4) the improvident and proscribed act of the Board's secretary consolidating the separate and distinct Formal Complaints that arose out of separate events and transactions, (5) the denial of access to the minutes of the

Board and the list from which the Master was selected or appointed, (6) the deprivation of procedural due process where misconduct was found on substantive charges not contained in the Formal Complaints which likewise impacted on the extreme punishment imposed, and (7) the Board's conclusions of law denied the Petitioner equal protection and due process since such conclusions were actually not the applicable law in Michigan at the time the events complained of occurred. The Board, other than reducing the Order of Revocation to a three (3) year suspension of the Petitioner, upheld all actions of the Master, Panel #11 and itself. All of these federal questions discussed above were raised in Petitioner's Application For Leave To Appeal to the Michigan Supreme Court. However, since the Michigan Supreme Court would not hear the case, the federal questions raised throughout the proceedings below became final without judicial intervention.

For example, the Master ordered the Pro-

secution, with respect to the Prosecution's proposed Exhibit "56", "to excise or white out or cut out all comments other than those made by" the Petitioner. (Tr.967) Master Kaplan in ruling on Petitioner's objection to the Prosecutor's proposed Exhibit "56" pointedly stated:

> "MASTER KAPLAN: It's the ruling of the Master, Mr. Campbell, that your motion -- your objection is sustained except for statements made by you that are memorialized in the report.
>
> In fairness to you, I want the report excised, because although I would promise you not to the read the report I don't think it should be in the record as to comments made by other people." [Emphasis Added] (Tr.968)

For another example, on August 29, 1988 the Respondent filed with the Board and served Petitioner with a Motion entitled: Commission's Request For Admission Of Documents, and citing in support thereof "MCR 2.302 (A)". This instant motion was argued on September 7, 1988, and taken under advisement with Panel #11's decision being rendered on October 27, 1988 via a written Order.

Petitioner, of course, objected this

allowance of discovery permitted outside of MCR 9.115(F)(4)(a)-(c).

On or about August 29, 1988 when the Respondent filed the Request For Admission of Documents, Respondent cited as authority for such request MCR 2.302(A). Rule 2.302(A) involves the "availability of discovery" under the Rules of Civil Procedure.

The Respondent's reliance on, and Panel #11's and the Board's allowance of discovery of this nature is clear error. Moreover, MCR 9.115(A) states, in its pertinent part:

> "(A) Rules Applicable. Except as otherwise provided in these rules, the rules governing practice and procedure in a nonjury civil action apply to a proceeding before a hearing panel." [Emphasis Supplied]

Thus, MCR 2.302(A) does not "apply to a proceeding before a hearing panel", because discovery is "otherwise provided in" MCR 9.115(F)(4) which pointedly is extremely limited to the parties in misconduct proceedings under Chapter 9, Subchapter 9.100 et seq., and which states:

"**(4) Discovery.** Pretrial or discovery proceedings are not permitted, except as follows:" [Emphasis Supplied]

It should be also noted that while MCR 9.115(F)(d) permits a panel to hold a pre-hearing conference "to obtain admissions" or narrow the issues, such authority does not open a proceeding under MCR 9.100 et seq. to discovery provided for Subchapter 2.300 [i.e. MCR 2.301 through MCR 2.316].

Again we have utilized in these sort of proceedings a double-standard which denies equal protection of law.

Panel #11 under its Order dated October 27, 1988 granted discovery under MCR 2.302(A) or MCR 2.312, as the case may be, notwithstanding such discovery is proscribed under the plain reading of MCR 9.115(F)(4) made applicable through MCR 9.115(A).

What Panel #11 and the Board has created in its application of MCR 2.302 (A) or MCR 2.312 is to expand the limited scope of MCR 9.115(F)(4) in favor of the Respondent, and in so doing provide a subordinate form of

discovery to a Petitioner attorney. The Fourteenth Amendment, which became law in 1869, was enacted to control such creations by those acting under color of state law, and put some teeth in the Thirteenth Amendment enacted in 1866. Put simply, the Petitioner was, given the expansive grant of discovery under the sponsorship of MCR 9.115(F)(4) extended to the Respondent, denied equal protection of the law and unequal discovery opportunities. This should be halted by this Court.

Equal protection includes the premise that persons subject to the law be treated alike, under like circumstances and conditions, both in the privileges conferred and the liabilities imposed. Marchant -vs- Penns. Ry. Company, 153 U.S. 380 (1894) This second class right to discovery given to Petitioner attorneys should be nullified and not permitted to stand by this Court.

For another example, on January 9, 1989 the Petitioner went to the offices of the Attorney Discipline and requested copies of

the following materials under the authority of MCR 9.126; to wit:

(A) Written request from Panel #11 Chairman, David I. Rosin;

(B) Minutes of the Board underlying the David I. Rosin request and the Board's vote thereon; and

(C) The Master's List from which the instant appointment was made.

Petitioner was given a copy of the "written request from David I. Rosin" which was dated "filed" with the Board on October 11, 1988, but the Board's staff, on January 9, 1989, indicated that the minutes of the Board are not given out to a Petitioner, and the Master's List request had to be addressed by the John F. VanBolt, the Board's Executive Director and General Counsel.[1]

The "exclusive constitutional responsibility" [MCR 9.110 (A)] ought not be subject

---

[1] It is to be noted that the delegation request was made even before the entry of Panel #11's adjudication dated October 27, 1988. Further, a copy of this missive was not served upon the parties.

to politicking or simple flight from responsibility by a panel because "factual issues are quite complex" [Rosin's letter dated October 11, 1988] and thereby the establishment of a procedural hearing scheme not expressly authorized by Court Rule, and where the minutes and list from which a a master is appointed is unavailable to a Petitioner attorney when demanded. cf. Batson -vs- Kentucky, 476 U.S. 79; 90 L.Ed.2d.69 (1986) [exclusion of all members of a defendant's race, on the basis of race, is a denial of equal protection]. The arbitrary ouster of representative Black attorneys serving as masters could not be checked by the Petitioner without access to the list of Masters. Such lists formerly were published in the Michigan Bar Journal [See, e.g. the July 1980 Issue, pp. 458-459. This denial of access of such a list is akin to a defendant not being able to see the jury sheets or records before they are seated to pass judgment on an accused party.

The principal rule enunciated in Batson

-vs- Kentucky, 476 U.S.79 (1986) has been extended to include civil actions. The 7th U.S. Circuit Court of Appeals on December 12, 1990 became the second Circuit to extend Batson -vs- Kentucky, supra, to civil litigation. Dunham -vs- Frank's Nursery & Crafts, Inc., 89-2109. State action is rather obvious in a disciplinary proceeding in Michigan - the prosecutor-Respondent, representing the State as the prosecutorial arm. The Board's action in refusing to provide access to the Master's List effectively foreclosed any challenge by the defense as to the exclusion of all members of the Petitioner's race, on the basis of race. The Petitioner is Black and the Master is White.

It is also equally clear that "(i)ntegrity is the very breath of justice. Confidence in our law, our Courts, and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites towards the administration of justice

a doubt or distrust of its integrity" Erwin M. Jennings Company -vs- DiGenova, 108 Conn 491, 499; 141 A. 866, 868 (1928). Within this context, it is a denial of due process and equal protection of the law to deny the Petitioner access to the minutes and the Master's List from which Steven M. Kaplan, was appointed.

The net result is that the checks and balances against unauthorized actions cannot possibly be discovered by a Petitioner to ensure due process itself against a backdrop of access being denied by Board fiat. See, e.g. Kent -vs- United States, 383 U.S. 541; 16 L.Ed.2d 84 (1966); In The Matter Of The Application Of Gault, 384 U.S.541; 16 L.Ed.2d 1013 (1966). Fundamental fairness and all notions of fair play to satisfy due process itself mandates such access and disclosures to the Petitioner.

Another clear example of the federal question being raised timely and properly raised so as to give this Honorable Court

jurisdiction [Sup.Ct.R. 14.1(h)] is concisely demonstrated as follows:

The Order discipline concluding Petitioner committed misconduct together with the punishment imposed was based on substantive separate and distinct charges not contained in the Formal Complaints, and further made conclusions of law constituting reversible error on substantive issues.

Hence, it is apparent that the punishment imposed on the Petitioner was predicated in part necessarily upon a finding of misconduct under "MCR 9.103(3)(4)(6)" with respect to Case No. 133-88.

No "MCR 9.103(3)(4)(6)" violation is alleged, for example, in Formal Complaint ADB 133-88, and secondly, no such Court rule itself even exists. An attorney may only be found guilty of misconduct as charge in the Complaint. In re Ruffalo, 390 U.S.544; 88 S.Ct.1222; 20 L.Ed.2d 117 (1968)

Hence, due process, on its face, is not satisfied where the discipline imposed gave

weight to such "finding and conclusions of the panel" [See, Opinion, Page 1, Para.4] in passing on the question of punishment of three (3) years.

Next, essentially the Respondent charges in its Formal Complaint that the Petitioner had a "duty", under DR 9-102(A), to deposit the proceeds, i.e. Seven Thousand Four Hundred Twenty Eight and 87/100 ($7,428.87) Dollars, into "a Trust Account". See, Count I, para J.(i).

Now going to the Respondent's contention that a violation of DR 9-102(A) has occurred; first one would have to totally ignore the client's wishes in the matter, i.e. don't put my money in your Trust Account for the issuance of a check for I want cash! In this regard, the Respondent's own witness, Ronald Karp, Esq., on July 10, 1989 testified pointedly that a Client may request cash instead of having a lawyer pass the client's proceeds through a Trust Account. Moreover, any reasonable assessment of DR 9-102 (A) would

clearly reflect that the Rule only applies "unless the Client otherwise directs". This condition has been codified in some states. See, e.g. Cal. Business and Professions Code, §6076 [west 1962] See, also Michigan Supreme Court Order of October 23, 1987 included such language to amend DR 9-102 and stated it would read:

> "(A) Unless the client directs otherwise, all funds of clients paid to a lawyer..... shall be deposited in an interesting-bearing account....." [Emphasis Added]*

Secondly, the Respondent's charge advanced under DR 9-102 (A) completely ignores also the fact the Wayne County Circuit Court, via Judge Dunn issued an Injunctive Order which, on its face, prevented the Petitioner from even delivering or turning the funds over to the client. See, Respondent's Exhibit #34. The Ex Parte Order, dated September 17, 1981 [Exhibit #34] pointedly prevented the changing

---

* Note: This exception was written into Michigan law effective until October 1, 1990 [See, MRPC 1.15(b)]. Likewise after October 1, 190 [See, MRPC 1.15(b)] "...by agreement with client...."

of the status quo.[2]

Against this backdrop and the Court's Order the Respondent had asserted that the Petitioner should have run the risk of ignoring or possibly violating (not only the Client's directive of not wanting to be issued a check) the clear mandate of the Court's Order itself and "depositing the proceeds into a Trust Account" which neither Judge Dunn's Order or the Client herself authorized. To underscore the absurdity of such contention one only has to consider the fact that had the Petitioner "deposited the

---

[2] "IT IS ORDERED that Plaintiff, SHIRLEY WRIGHT, be and she is hereby ENJOINED by this Court from negotiating or otherwise disposing of cashiers check no. 4780807, issued by National Bank of Detroit in the amount of $7,428.87, pending the further order of this Court;

* * *

IT IS FURTHER ORDERED that in the event that the aforementioned cashier's check has been negotiated by SHIRLEY WRIGHT and/or FLETCHER J. CAMPBELL, that they be and are ENJOINED from disposing of the proceeds from same pending the further order of this Court;" [Emphasis Added]

Note: This exception is written into Michigan Law [See, MRPC 1.15(b)]. "Except as...or otherwise permitted by law..."

proceeds into a Trust Account" against the wishes of the Client and Judge Dunn's Order then more than likely the Respondent would merely be heard to replace the alleged DR 9-102(A) violation with a charge being leveled against the Petitioner that he violated DR 7-106(A) [i.e. "a lawyer shall not disregard or advise his client to disregard a standing rule of a Tribunal....."] and DR 1-102(A)(1)(5)(6), inter alia.

Of course, the aforementioned circumstances do not even address the fact that Judge Dunn more than likely would have held the Petitioner in contempt which may have resulted in a fine, imprisonment or both; and such contempt proceedings may have been civil, criminal or both for violating his Order. See, e.g. Ex Parte Gilliland, 284 Mich 604; 280 NW 63 (1938), cert den 306 U.S. 643; 83 L.Ed. 1040; Harvey -vs- Lewis, 10 Mich App 709; 160 NW.2d. 391 (1968) [held contempts may be classed as civil or criminal].

In sum, no violation of DR 1-102(A)(1)

(3)-(6); DR 9-102(A) or (B)(4) occurs where a Petitioner-attorney, in compliance with a Court Order, maintains the status quo and not "pay or deliver to the Client....the funds" [DR 9-102(B)] which could constitute criminal or civil contempt or both for such mis-doings which affront the dignity of the Court. Jaikins -vs- Jaikins, 12 Mich App 115 (1968); Harvey -vs- Lewis, supra

Further it is clear, given the Ex Parte Order of the Circuit Court, that the proceeds of the garnishment could not be turned over to the Client. Also, DR 9-102(B)(1)-(4) had been followed at the direction of the Client. In short, the only duty owed in this matter under Count I was the Petitioner's client, Shirley Wright (hereinafter "Wright"). Her (Wright's) specific directions were adhered to, including obeying the Injunctive Order.

Next, Respondent alleges in Count II that a violation of DR 1-102(A)(4)-(6) has occurred. Hence it is certainly not "misconduct" described thereunder unless the Respondent can

prove that in fact the monies taken from the Trust and Payroll Accounts was Garnishment proceeds. In this regard it is to be noted that the Respondent has alleged that on September 16, 1981 only "cash" was received by the Petitioner; [See, para. K.(ii)] that in fact the Respondent has alleged that "Petitioner did not deposit said Seven Thousand Four Hundred Twenty Two and 87/100 ($7,422.87) Dollar check into a Trust Account" [See, para K.(i)] further clearly supports non-removal of funds.

In further, and a more clear, demonstration of the fact that the monies deposited by the Petitioner were not the proceeds of the Garnishee-Defendant NBD is pointedly reflected in one of the Respondent's own Exhibits itself given to Petitioner through discovery where a notation is made thereon by bank personnel which states:

> "checked bank's computer there wasn't an account in the name of Fletcher Campbell at the time above check was presented. "No deposit." Check had to have been "cashed" per Anthony Monales

NBD Security. 02-10-88 R.A." [Emphasis Added]

[See, Exhibit 78, in evidence]

Petitioner's testimony on this point, when coupled with the demonstrative evidence of the Respondent itself, reflects that the check was "cashed" and "no deposit" was made. Weighing this trial evidence, as the Master must under a MCR 2.504(B)(2) Motion, it follows that the allegations contained under paragraph K.(iii), (iv), (vi), (vii) and (viii) must fail for failure of the Respondent to meet its burden of proof.

The burden of proof rests with the Respondent in these proceedings. That is to say that the Respondent has the burden of proof to establish by competent evidence which out weights the evidence against it. Strand -vs- C & W.M. Ry Company, 67 Mich 380 (1887); Hanna -vs- McClave, 273 Mich 571 (1935); Cook -vs- Vineyard, 291 Mich 375 (1939)

Further, this burden never shifts to the Petitioner. Weaver -vs- Motor Transit Management Company, 252 Mich 64 (1930); A.J.Brown &

Son, Inc. -vs- City of Grand Rapids, 265 Mich 465 (1933)

Hence, the Respondent in the instant case had the burden of proof on all the elements of its case. School District of the City of Ionia -vs- Dadd, 380 Mich 220 (1944); Rogers -vs- City of Detroit, 340 Mich 291 (1954)

In short, allegations of mere conclusions are not sufficient to save a pleading from dismissal on proper Motion. Plassy -vs- S. Loewenstein & Son, 330 Mich 525, 527 (1951); MCR 2.504(B)(2)

Further, in terms of the subsidiary federal questions raised, the Respondent had steadfastly contended, through its witness, Mary H. Sanders, that Petitioner deposited the Cashier's Check [Exhibit "78"] into two (2) different checking accounts, with a balance of One Thousand Sixteen ($1,016.00) Dollars being given to Petitioner in cash. On the other hand, Petitioner had steadfastly contended that he and his client admittedly cashed the $7,428.87 Cashier's Check [Exhibit

"78] on September 16, 1981 and received all of the $7,428.87 which was thereafter held in the Petitioner's office safe because of the issuance of a Temporary Restraining Order by Judge Dunn preventing the money being disposed of or given to Mrs. Wright, the Petitioner's client, and maintained the status quo until permitted to disburse funds.

Moreover, the record in this cause reflects the following exchange between defense counsel and witness Sanders on the foregoing point which went as follows: [Tr.1238]

A CL does not mean collection, it means check link.

Q Check link.
What does it -- what's the distinction between a person receiving a receipt that says CL as opposed to a cash deposit?

A Okay.
CL means -- that means you are linking that deposit up to the check.

Q Okay.
Let's go to -- now, let's say I gave you cash, what would it say?

A It would just say credit.

Q Credit.
Now, what, what -- so --

A CR.

Q CR?

A Um-hmm.

Q Now I noticed -- do you have copies of the receipt that you gave the customer back on September the 16th, 1981 which would show us whether or not it was a CL deposit as opposed to a CR credit deposit?

A Mr. Campbell, we don't keep copies of those blue birds.

The so-called "Blue Birds" testified to by Ms. Sanders and issued by the Nation Bank of Detroit is attached hereto covering on the $3,583.89 deposit of September 16, 1981 [See, Exhibit "A", Transcript Receipt] [App.161], and it clearly shows that the deposit resulted from the depositor giving "cash" by the designation of "CR" thereon as clearly distinguishable from a "Check Link" or "CL" deposit as Ms. Sanders' oral testimony provided in impeaching the banks own subpoenaed business records.

Moreover, the Board was in possession of new and material evidence that ought to have caused the Board to Re-open and reconsider its Opinion and Order Reducing Discipline, or if the Board believed that additional testi-

mony should be taken, it should have referred the case to a hearing panel or master. MCR 9.118(C)(2). This Court ought not ignore this evidence in passing upon the Petitioner's practice of law. MRE 103(d)

Another subsidiary issue concerns the fact that a $600.00 retainer fee was indeed collected in connection with this Petitioner's retention in instituting Court action for (1) Appointment of Guardian and (2) Appointment of Conservator, both separate and distinct proceedings under Michigan Statutes and Court Rules. The finding for misconduct on this aspect is neither supported by the caselaw, statutes or Court rules governing attorneys in Michigan at the time of its occurrence. As a matter of fact the state's expert witness John Vonbatchelder, an attorney in the state of Michigan for over fifty (50) years, testified pointedly that he was of the opinion that the $600.00 retainer fee paid to this Petitioner was proper, and, even more importantly, that charging a retainer

fee in a probate matter does not violate any disciplinary rule [Tr.683, 736]. Petitioner, as well as Mason's counsel Mr. Auslander, both testified that contingent fees are not prohibited in probate matters [Tr. 428, 429; Tr. 430; Tr.232] Additionally, it must be noted that back in September 1983 when this Petitioner was retained to render the aforesaid legal services the Michigan Appellate Court itself recognized that it was not then readily clear whether a fiduciary may pay an attorney's fee prior to Court approval. This unclearness that prevailed then was pointedly expressed in the 1984 Michigan Appellate Court decision of In Re Thacker Estate, 137 Mich App 253 (1984) where the Court stated:

> "The plain language of the provision (MCLA 700. 541; MSA 27.5541) requires judicial approval before the fiduciary may take its initial payment. Thus, appellant (fiduciary) erred in paying itself without Court approval. [Emphasis Added]
>
> It is not as readily apparent whether the fudiciary may pay an attorney's fee prior to Court approval. The statute merely states that counsel may be retained without Court approval and shall receive reasonable compensation for his

> services. However, PCR 707.1(d)(2) requires approval of attorney compensation to be sought pursuant to PCR 908. [Emphasis Added] 127 Mich App 253, 263 (1984)

To underscore the unclearness expressed by the Thacker Court with respect to payment of attorney's fees prior to Court approval, a May 27, 1987 Michigan Court of Appeals decision in footnote 2 of its opinion finally made the governing Court Rule clear where it pointedly stated:

> "2 MCR 8.303, formerly PCR 908.3, makes clear that the probate court must approve attorney fees in all cases." [Emphasis Added] Fletcher J. Campbell, J.D., P.C. -vs- Ophelia Mason, Docket No. 86326 (05-27-87) _____ Mich App _____ (1987)

In short, a new Court Rule was established effective January 25, 1985, i.e. MCR 8.303, to replace patently unclear and confusing meaning and guidance of the former PCR 908.3. Now MCR 8.303 requires Court approval of attorney fees even when the affected parties have consented. Against this backdrop the finding of misconduct on this aspect is inconsistent with the law itself and denied this

Petitioner due process. It is also most important to note that the Probate Court did subsequently approve the $600.00 fee upon which the supposed misconduct was predicated in accordance with In Re L'Esperance Estate, 131 Mich App 496; 502; 346 NW2d.578 (1984), cited in Fletcher J. Campbell, J.D., P.C. -vs- Ophelia Mason, [Ex #19], where its stated:

> "Hence, although a conservator may hire an attorney and may agree to pay a certain fee, the attorney's fee is clearly subject to the probate court's scrutiny and may, in fact, be altered by the probate court."

Put simply, the $600.00 fee was agreed upon between the parties, paid, and then subsequently approved by the Probate Court. There certainly is no misconduct here properly supported by the law objectively when applied to the record in this cause if read by those charged with reviewing same.

Another issue raised concerns the Board's issuing formal complaint alleged, under Count II, para.C(ii), that a "Contingent Fee Contract For Services" was entered into between this Petitioner and his client, Mason, and this action violated a disciplinary Rule. In short, the formal complaint had alleged that (1) a contingent fee contract in a probate case is prohibited and (2) the fee charged is under such contract is "clearly excessive". This simply is not the law.

Moreover, assuming the truth of such allegation for the purpose of considering a dispositive exposition of the caselaw and court rules, as we must, under Michigan law [MCR 2.116(C)(8); MCR 2.504(B)(2)]; Davis -vs- Kramer Brothers Freight Lines, 361 Mich 371, 376(1960); DeNike -vs- County of Otsego, 45 Mich App 711, 714 (1973)], nevertheless the applicable disciplinary rule [DR 2-106 (C)] and Michigan Court Rule [formerly GCR, 1963, 928 now MCR 8.121] on their face is inopposite to the position taken under the formal com-

plaint and covering on such matters.

Moreover, DR 2-106(C) pointedly sets forth the types of agreements which are proscribed wherein it says:

> "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee in a divorce case or for representing a Defendant in a criminal case." [Emphasis Supplied]

Needless to say, probate matters are not included under DR 2-106(C). Substantively, there is no violation where no disciplinary rule exists prohibiting such retention as alleged by the formal complaint in Court II via a "Contingent Fee Contract".

Also it was the Board's finding that the Contingent Fee Contract was "clearly excessive". Again as a matter of law such allegation must fail because the substantive law is inopposite. Moreover, MCR 8.121 indeed permits an attorney to enter into a "Contingent Fee Agreement" with a "maximum allowable fee ...(of) one-third (1/3)". See, MCR 8.121 (B) No other Court Rule outlining and defining a "contingent fee" contract exists.

On considering the evidence introduced at this trial the Fiduciary herself testified as to the assets of the estate when (1) she stated that the stock sold by her through her broker, Comerica-Bank-Detroit, exceeded Two Hundred Thousand ($200,000.00) Dollars, (2) she had also money in bank [see, Exhibit #49 in evidence], and (3) she obtained in August 1984 proceeds of the ward from the safe/vault [see, Exhibits #50 and 51, in evidence]. Hardly can any set of facts adduced by the proofs in the underlying record evidence a receipt by this Petitioner of an amount which violates MCR 8.121(B) of one-third (1/3) allowable to an attorney.

More significantly, it must be noted that testimony or proofs on the amount of assets of the estate came from (1) the Petitioner's testimony under the adverse party statute upon questioning by, the Respondent's counsel, (2) Exhibit No's 49, 50 and 51, and (3) the Fiduciary's testimony wherein she stated stock sold through her broker/bank was Two Hundred Thou-

sand ($200,000) Dollars or more, coupled with that secured by her in August 1984 from the safe/vault. Further, when the Prosecution's expert was asked how much and what were the total assets of the estate he (i.e. John Von Batchelder) testified that he did not know in contrast to the Petitioner's adverse party testimony that the assets exceeded One Million ($1,000,000.00) Dollars. It seems hardly fitting, given this "proof", that the Petitioner had contracted under a "Contingent Fee" arrangement for more than one-third (1/3). Exhibit #8 shows otherwise. Likewise, Sixty Six Thousand Eight Hundred Thirty Six and 17/100 ($66,836.17) Dollars, plus One Thousand Three Hundred Fifty Seven ($1,357.00) Dollars can hardly be said, as a matter of fact or law, to be more than the 33-1/3 set forth in Exhibit #8 itself, or more than 33-1/3 of over the excess of the one million ($1,000,000.00) dollar estate that was subsequently established on the record. Likewise, Mason testified that after she was appointed Guardian-Conser-

vator, and with the assistance of Petitioner, she was able to locate a safety deposit box that had been removed from a closed bank (Tr. 1091). Mason readily admits that the contents of the located safety deposit box was worth at least one million dollars (Tr.625) (Ex. 51).

In sum, the Board's adopted finding on this aspect against the backdrop of the right and legal application of DR 2.106(C) and MCR 8.121, left the Petitioner entitled to a Dismissal, when coupled with the Petitioner's testimony itself of the services performed [See, Exhibit #73] which was not refuted by the Prosecution.[3]

---

[3] It should be noted that the claim that the payment under the first contract of $1,357 [Ex.#1] constituted misconduct under DR 2-106(A) and (B) is wholly without merit since both the Probate Court and the Michigan Court of Appeals approved the payment of such sums to this Petitioner. The alleged misconduct with respect to "contingent fee" contract [Ex.#8] is governed by DR 2-106(C) and MCR 8.121 at most, and no DR 2-106(C) violation was alleged in the Board's Formal Complaint with respect to the second contract, i.e. Exhibit #8. See, also, In The Matter Of John Ruffalo, Jr., Supra.

Another federal question; essentially under the Count III, of the Board's Complaint contends that apparently some "Order" or "Opinion" of the Court of Appeals had not been obeyed by the Petitioner.

For the claimed substantive charge(s) under this Count III, the Prosecution contended DR 1-102(A)(1)(5)(6) and DR 7-106(A) had been violated.

The DR cited by the Prosecution in the Board's Formal Complaint and conclusions state:

DR 7.106. Trial Conduct

> (A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

Hence, even if its assumed that the Court of Appeals is a "Trial" Court or "Tribunal" within the meaning of DR 7-106(A), which is vehemently denied, nevertheless there still has been no violation of the Court of Appeals Order dated May 27, 1987 because the Order itself does not mandate the Petitioner to do anything, but pointedly states in its charging mandate/adjudication that the matter is:

> "Reversed and remanded for proceedings consistent with this opinion. Costs to Appellee-Cross Appellant." [Emphasis Added]

In short, the Order remands the matter back to the Trial Court, i.e. Probate Court, "for proceedings....". The Prosecution had not in any fashion presented competent "proofs", by preponderation or otherwise, that the Petitioner had not obeyed "all Orders of the Court of Appeals", for the Order speaks for itself.

Moreover, Courts do not speak through their opinions but through their Orders, Judgments and Decrees. Jones -vs- Hicks, 358 Mich 474; 100 N.W.2d 243 (1960); Pierson -vs- Pierson, 351 Mich 637; 88 N.W.2d 500 (1958); Nemes -vs- Smith, 37 Mich App 124; 194 N.W.2d 440 (1971). An opinion by a Court is merely evidence of the law, and not the law. See, C.J.S., Courts §222. Thus, a Court's adjudication, and not the language of the writer of the opinion, establishes the "law of the case". Attorney General ex Rel. O'Hara -vs- Montgomery, 275 Mich 504; 267 N.W.550 (1936)

In sum, there had not been a proper invocation of the Trial Court's jurisdiction after the

entry of the May 27, 1987 adjudication pointedly reversing and remanding the matter back to the Trial Court "for proceedings..." in the case. Put simply, the mandate of the Court of Appeals is directed not to the Petitioner, but to the Trial Court. Hence, no failure to obey within the ambit of DR 7-106(A) as matter of fact or law. Lastly, no Order had been entered by the Trial Court effectuating the Court of Appeals' opinion as required. MCR 7.215(F) ["execution on its Judgement is to be obtained or enforcement proceedings had in the Trial Court" after the record has been returned under MCR 7.210(I) and (J)].

It is to be noted that the Prosecution presented absolutely no proof that subrule 7.210(J) had been complied with after the Court of Appeals was decision was issued on May 27, 1987. MCR 7.210(J) states:

> "**(J) Notice by Trial Court or Tribunal Clerk.** The trial court or tribunal clerk shall promptly notify all parties of the return of the record in order that they may take the appropriate action in the trial court or tribunal under the Court

of Appeals mandate." [Emphasis Added] [Amended effective October 1, 1989.]

This the trial Court had failed to do. See, also United States -vs- Covino, 837 F.2d. 65 (CA 2, 1988), and People -vs- Johnson, 397 Mich 868 (1976)

Thus while under MCR 7.215(E) "an opinion is notice of the entry of the judgement of the Court of Appeals", nevertheless under the Court Rules it is perfectly clear the Court did not Order the Petitioner to do anything for its mandate was directed to the trial Court.

Put simply, the Order of the Appeals Court merely remanded the case back to the Probate Court with any enforcement [of this "money judgement", see, slip op. p.8(5-27-87) Court of Appeals] [Ex. #19] necessarily abiding the action of the trial Court. The Prosecution presented absolutely no evidence of trial Court action after remand until after the Master's decision, which was adopted by

the Board, had been rendered.[4]

In conclusion, when the alleged misconduct violations were found under Count III of the Board's Formal Complaint by the Master, there existed absolutely no "Order and opinion of the Michigan Court of Appeals directing [Petitioner] to reimburse the estate for the excessive fees". The Master in his findings conceded this in his conclusion where he pointedly, in its pertinent part, stated:

> "Conclusion: Respondent [Petitioner] disregarded the Order of the Michigan Court of Appeals, which **indirectly** [not "directly"] ordered him to return the excessive fees to the Estate." [Emphasis Added as well as bracketed words.]

Likewise, it is to be noted that the Master and Board has now decreed that indirect orders, whatever they are, should guide an attorney's ability to practice law in the state of Michigan. This is clearly a depar-

---

[4] The Amended Order of the trial Court in the underlying Case #763-105 was not even in evidence on November 10, 1989 when the Report Of The Master was issued with respect to page 10 of Count III of the Formal Complaint and its alleged violations.

ture from the due process requirements mandated by the United States Supreme Court in The Matter of John Ruffalo, supra. The Court of Appeals Order [Exhibit #19] simply does not say what the Master or the Board found on this aspect yet the Petitioner was suspended for thirty-six (36) months as a part of such punishment to such non-existent Order or on such an indirect order.

In another federal question; essentially the Board's Formal Complaint under Count IV, contended that the Probate Court entered an Order restraining the Petitioner from disposing of or transferring assets in his possession, as distinct from a non-named party, which purportedly belonged to the estate. This temporary restraining Order was dated January 31, 1985 [Exhibit #17]. The underlying funds in question were issued to Petitioner only by a check dated December 5, 1984 [Exhibit #11]. The evidence adduced at trial shows that the check [Exhibit #11] was cashed by the Petitioner at the Estate's bank.

In reaching its conclusion that the Petitioner violated a temporary Restraining Order the Board adopted the Master's finding that purportedly:

> "4. The record shows that the $9,000.00 was part of a $55,836.17 deposit made by Respondent [Petitioner] on December 5, 1984, at Comerica Bank-Detroit (Ex 12). The deposit was generated by the $66,832.17 check (Ex 11) that Respondent [Petitioner] requested and received from the Estate's conservator Ophelia Mason, on December 5, 1984.
>
> CONCLUSION: Respondent [Petitioner] knowingly violated an Order of the Probate Court by transferring funds on February 1, 1985, that he received from Bessie Irwin's Estate."

This aforesaid finding and conclusion is totally inconsistent with a finding and conclusion made by the Master and the Board with respect to Count V of the Formal Complaint regarding the accounting given to the Probate Court by the Petitioner back in September 1986 with respect to the "Estate's funds" [Exhibit #14] wherein no misconduct was found, when coupled with the fact that the Master and the Board totally ignored the other deposits made to the account before February 1, 1985 which

were not so-called estate funds and its impact accounting-wise on its computations in reaching a decision that the $9,000.00 withdrawn was a part of $55,836.17 as separate and distinct from other funds so deposited and the beginning balances deprived therefrom. Put simply, this wholly improper computation error was permitted to be ignored, even assuming that the Petitioner was served with the TRO, where absolutely no distinction was made or justified with respect to other deposits in question [either prior to December 5, 1984 and before February 1, 1985] and its impact on the appropriate beginning balances.

Moreover, the conclusion and finding under Count IV of the Formal Complaint is wholly inconsistent with the conclusion and finding under Count V. The conclusions returned with respect to Counts IV and V are incapable of logical reconciliation and cannot be sustained. See, e.g. Hughes -vs- United States, 95 F.2d.538, (CA 5 Fla.(1938) dictum); People -vs- Chambers, 22 Cal App 2d. 687; 72

P.2d.746 (1937); Smith -vs- State, 38 GA. App. 366; 143 SE 927 (1928); Davis -vs- State, 43 GA App 122; 157 SE 888 (1931); Finch -vs- State, 87 GA App 426; 74 SE 2d 121 (1953) It is generally understood that "inconsistency" means some logical impossibility or improbability implicit in the findings on the several Counts at the same time. It ordinarily arises from factual considerations, as in the case at bar, where the Board found, via the Master, that the Petitioner transferred funds on February 1, 1985 that he received from the Estate [Count IV], but under Count V that Petitioner did not make false statements to the same Probate Court with respect to the disposition of the same estate funds through a Court ordered accounting [Exhibit #14]. There simply is no rational consistency to these opposite conclusions dealing with the same funds themselves. With respect to Count V the Master observed as follows:

> "1. On September 10, 1986, Respondent [Petitioner] was ordered by the Probate Court to account for the money received

from the Irwin Estate.

2. Respondent [Petitioner] filed an accounting on September 23, 1986."

The observation of the Master went on to state as follows:

"5. Respondent [Petitioner] did not meet its burden of disproving Petitioner's [Petitioner's] claim that he made cash payments totaling $31,500.00 to Love, Rickenbacker, and the State of Michigan with funds he gained from the Irwin Estate.

CONCLUSION: Respondent [Petitioner] did not make any material misstatements to the Probate Court in his accounting of September 23, 1986."

This is diametrically opposite to the Master's own finding of fact and conclusions of law as to Count IV of the Complaint.

After the substitution of Mr. Auslander as attorney for Ms. Mason as guardian and conservator of the Irwin Estate, the Court ordered Petitioner to give an accounting for the disposition of the $66,832.17 he received in fees from the Irwin Estate. This accounting was filed with the Court in September of 1986 (Ex.14). In Count V of the Complaint Petitioner was charged with making false statements to the Court with regards to the disposition of the $66,832.17. The

Master found:

> "CONCLUSION: Respondent [Petitioner] did not make any material misstatements to the Probate Court in his accounting of September 23, 1986."

This accounting sets forth that by January of 1985 all funds received from the Irwin Estate had been disposed of by Petitioner. In fact a capitulation of the accounting discloses expenditures of $66,919.11 some $86.94 more than he received in fees.[5]

However in his finding of fact as to Count IV the Master concludes that a withdrawal of $9,000.00 by Petitioner from his bank account on February 1, 1985 constituted part of the $66,832.17 received from Irwin's Estate.

These finding are incompatible. The Master's finding that Petitioner did not mis-

---

[5] It should be noted that the Court of Appeals held in effect that in absence of a better accounting by Campbell an estimated fee of $1,657.00 was reasonable (Ex.19). However, in the herein de novo hearing the Master made no independent assay of the proof. (Ex.73) See, In Re Ruffalo, Jr., supra, MSEA -vs- Department of Mental Health, 120 Mich App 42 (1982)

represent to the Court his disposition of the Irwin fees establishes that all such fees were spent as of January 19, 1985, (Ex.14). If they were spent in January 1985 they could not be present in February 1985. In addition the Master ignores the funds, allegedly a part of the Irwin fees, were deposited, as well as subsequent deposits made that month of January 1985 and the beginning balance on December 5, 1984. In short the Master's conclusion that Petitioner's accounting was not a misrepresentation establishes that he could not have violated the Court's Order on February 1, 1985 as all of the Irwin Estate funds had been spent, (Ex.14).

Put simply, the inconsistency in the conclusions and findings of Counts IV and V cannot be reconciled logically with each other. Speiller -vs- United States, 31 F.2d 682 (CA 3 Pa., 1929); likewise the following set forth jurisdictions, including California, adopts this view; to wit: **Cal**-- People -vs- Kimmerle, (1928) 90 Cal App 186, 265 P 525 (recognizing

rule); People -vs- Walther, (1938) 27 Cal App 2d 583, 81 P2d 452; People -vs- Doxie (1939) 34 Call App 2d 511, 93 P2d 1068; People -vs- Grant (1951) 105 Cal App 2d 347, 233 P2d 660 (dicta); People -vs- Tophia (1959) 167 Cal App 2d 39, 334 P2d 133. **Colo** -- Webb -vs- People (1927) 83 Colo 1, 262 P 906, ovrld Crane -vs- People, 91 Colo 21, 11 P2d 567. **Ga** -- Evans -vs- State (1932) 46 Ga App 39, 166 SE 449 (recognizing rule); Hand -vs- State (1954) 90 Ga App 452, 83 SW2d 276. **Ill** -- People -vs- Bailey (1945) 391 Ill 149, 62 NE2d 796 (recognizing rule).

The majority view is that verdicts respecting the several Counts of a Complaint such as used in the instant case must be consistent. The acquittal under Count V negates wholly the essential elements of misconduct charged in Count IV which was against the Petitioner. See, for example, the following cases; to wit: **US** -- Rosenthal -vs- United States (1921, CA9 Cal) 276 F 714. **Ariz** -- State -vs- Fling (1949) 69 Ariz 94, 210 P2d

221; State -vs- Laney (1954) 78 Ariz 19, 274 P2d 838. **Cal** -- Ex parte Johnston (1935) 3 Cal 2d 32, 43 P2d 541. People -vs- Powell (1920) 50 Cal App 436, 195 P 456; People -vs- Andursky (1925) 75 Cal App 16, 241 P 591; People -vs- Novo (1936) 12 Cal App 2d 525, 55 P2d 915, reh den 12 Call App 2d 529, 56 P2d 560; People -vs- Hight (1949) 94 Cal App 2d 100, 210 P2d 270. **Fla**-- State -vs- Trafficante (1961, Fla App) 136 So 2d 264 (apparently recognizing rule). **Mo** -- State -vs- Headrick (1904) 179 Mo 300, 78 SW 630. **Pa** -- Commonwealth -vs- Fronheiser (1925) 6 Pa D & C 710, 11 Leh Co LJ 209, 39 York Leg Rec 135. **Wash** -- State -vs- O'Neil (1946) 24 Wash 2d 802, 167 P2d 471.

Put another way, eliminating the evidence necessary to prove Count V, the remaining evidence is also insufficient to support Count IV. Boyle -vs- United States, 22 F2d. 547 (CA 8 Neb., 1927); Speiller -vs- United States, supra; People -vs- Bales, 74 Cal App 2d 732; 169 P 2d 262 (1946).

In conclusion the repugnancy is quite evident in the verdict of the Master and Board under Counts IV and V.

NATIONAL BANK OF DETROIT

TRANSACTION RECEIPT

(The white lettering indicates information for customer records)

FIRST LINE SHOWS: Bank–Branch–Teller, Process Date, Transaction Code

032-072-10 09/16/81 ( ) TC-01
DDA 86187-44 3,583.89 CR 0622

SECOND LINE SHOWS: Sequence No.

NBD 1771-10 REV. 10/80 (Code Definitions on Reverse Side.)

Exhibit A

BEST AVAILABLE COPY